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No.

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IN THE
Supreme Court of the United States
OCTOBER TERM, 1989

GARREY CARRUTHERS, GOVERNOR OF NEW MEXICO,
O.L. McCOTTER, SECRETARY OF CORRECTIONS, and
ROBERT J. TANSY, WARDEN OF THE
PENITENTIARY OF NEW MEXICO,

Petitioners,
v.

DWIGHT DURAN, LONNIE DURAN, SHARON TOWERS,
and ALL OTHERS SIMILARLY SITUATED,
Respondents.

**PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT**

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QUESTION PRESENTED

Whether a federal court, on motion of state officials who are subject to a prison consent decree agreed to by predecessor officials, may refuse to vacate those portions of the decree that, as legal developments since entry of the decree made clear, go far beyond any federal-law requirements.

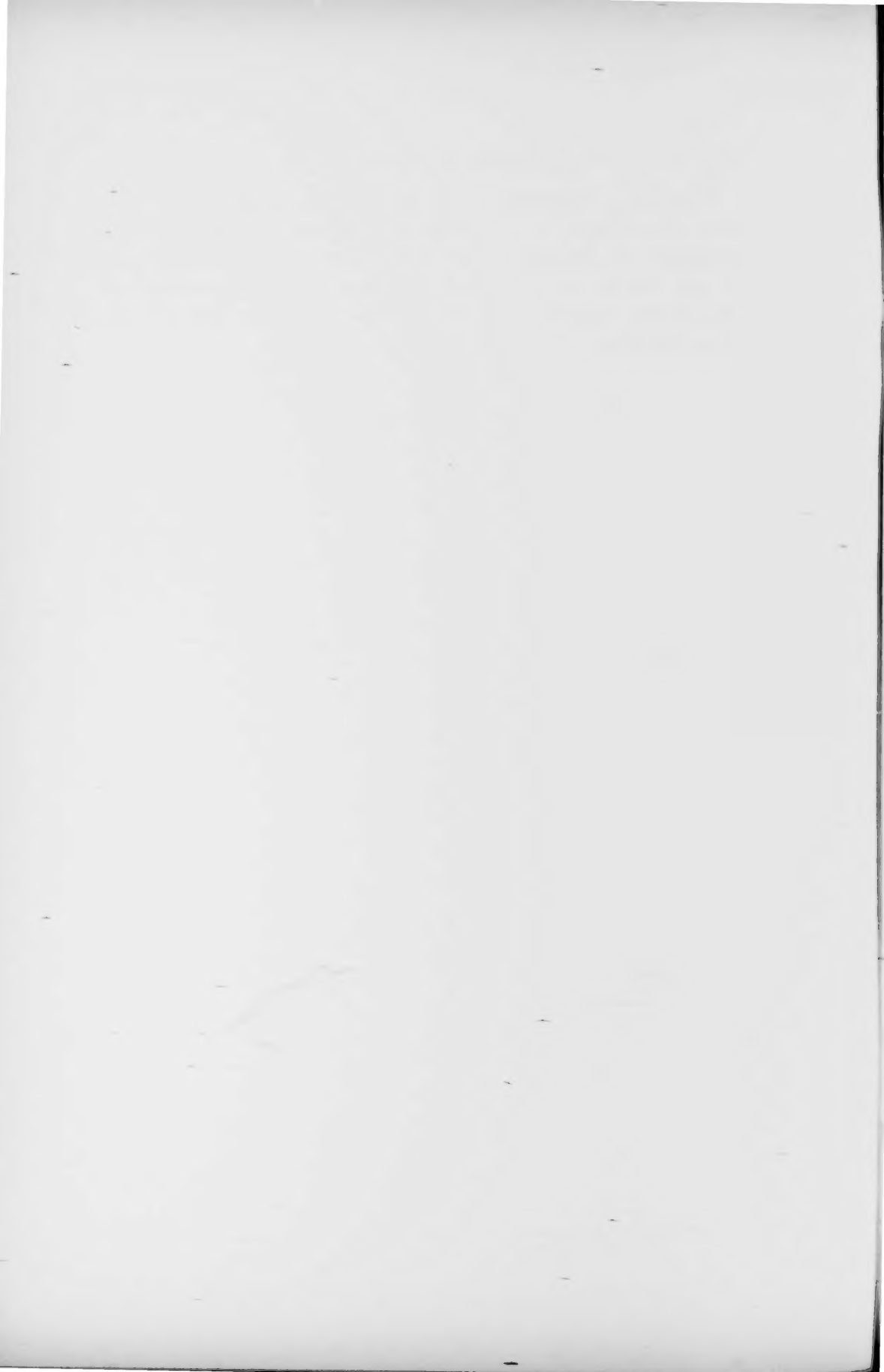


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Respondents.

**PETITION FOR A WRIT OF CERTIORARI TO THE
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The Governor of New Mexico, the Secretary of Corrections of the State of New Mexico, and the Warden of the Penitentiary of New Mexico petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Tenth Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-15a) is reported at 885 F.2d 1485. The opinion of the district court (Pet. App. 16a-45a) is reported at 678 F. Supp. 839.

JURISDICTION

The judgment of the court of appeals was entered on September 15, 1989. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATEMENT

This case involves a federal court consent decree that governs each of New Mexico's four prisons, including three that were not opened until after the decree was entered in 1980. The decree addresses in detail "the minimal civilized measure of life's necessities"—food, clothing, shelter, medical care, sanitation, and safety—that the Eighth Amendment guarantees to prisoners. See *Rhodes v. Chapman*, 452 U.S. 337, 348 (1981). The decree goes on, however, to specify policies and practices that the State's prison officials must follow in other areas, including the internal prison classification of inmates, the use of maximum security cells, the use of disciplinary measures such as segregation, the provision of training or education to inmates, and the practice of double celling. Petitioners challenge the district court's refusal, upheld by the court of appeals, to vacate those portions of the decree that are not legitimate remedies for the violation of federal rights.

1. *The Complaint.* In 1977, respondents, who were prisoners in New Mexico's only prison, the Penitentiary of New Mexico (PNM), filed this class action against petitioners' predecessors in office and two deputy wardens at PNM. The complaint, as amended, challenged a wide range of conditions and practices at PNM. Pet. App. 196a-206a. Based on a single set of factual allegations, the complaint asserted violations of the federal Constitution, the New Mexico Constitution, New Mexico statutes, and 42 U.S.C. § 3750 (b). Pet. App. 203a-205a.

In particular, challenging both the "totality of conditions and certain specific conditions" at PNM (Pet. App. 197a), respondents alleged that the prison was overcrowded, unsanitary, inadequately lighted, badly ventilated, and poorly heated and cooled; that its food and medical services were deficient; that prisoner safety was inadequately protected, citing understaffing and poor training of prison staff; that access to law books and resources was inadequate; and that correspondence and

visitation practices were too restrictive, irrational, and discriminatorily applied. In addition, respondents charged that PNM was in violation of New Mexico law, in that prisoners were not classified according to rehabilitation needs, but instead were generally assigned quarters based on space availability, resulting in classifications that exceeded security requirements. With respect to inmate activity, the complaint alleged that "[i]dleness is the hallmark of the PNM" (*id.* at 202a) and that there were inadequate work, training, education, and recreational opportunities for PNM's inmates. And with respect to inmate discipline, the complaint stated that due process was not observed and that the conditions of segregation cells were grossly deficient. *Id.* at 199a-203a.

2. *The Consent Decree.* a. In 1979, after the district court had certified a plaintiff class consisting of all present and future inmates at PNM, the parties agreed to, and the court entered, detailed consent decrees settling certain of respondent's claims. The decrees laid down rules governing inmate correspondence (Pet. App. 57a-65a), attorney-prisoner consultation (*id.* at 66a-74a), food services (*id.* at 75a-79a), inmate access to legal materials (*id.* at 80a-101a), and visitation (*id.* at 102a-131a). In early February 1980, PNM experienced a major riot resulting in numerous deaths, injuries, and property damage. *Id.* at 4a. Several months after the riot, the parties reached a settlement of the remaining claims in the litigation and proposed a comprehensive consent decree that incorporated the previously entered orders. *Id.* at 48a-195a. The district court—after expanding the plaintiff class to include all present and future inmates, not just of PNM, but of *any* maximum or medium security prison in New Mexico—approved the consent decree and ordered final judgment entered on July 14, 1980. *Id.* at 48a-51a.

b. The decree is "elaborate, extending well over 100 printed pages, and by its provisions regulate[s] many aspects of the prison operation." Pet. App. 4a. Both the parties in their agreement and the district court in

its order entering the decree acknowledged that the decree "may include specific requirements and procedures beyond what is required by the Constitution of the United States . . . or any other constitutional, statutory or common law requirement." *Id.* at 49a, 53a. Nevertheless, most of the decree is not challenged here. Specifically, petitioners have not moved to vacate provisions that, as the court below stated, "comprehensively regulate[] [petitioners'] conduct in the penitentiary in the area of (1) food services, (2) physical facilities, including clothing and personal hygiene items provided to inmates, (3) medical care, (4) mental health care, (5) correspondence between inmates and outsiders, (6) access to legal resources, and (7) attorney-client visitations." *Id.* at 4a.

The food services provisions of the decree, for example, provide for participation by an outside dietician, provision of meals meeting various religious requirements, specified temperature levels for hot and cold food, specified temperatures for dishwashing (and a daily log of such temperatures), and various hygienic controls. Pet. App. 75a-79a. Provisions dealing with living conditions limit the amount of time a prisoner may be kept in a cell each day and set standards governing, among other things, toilet and shower facilities, furniture (*e.g.*, bunk, desk, chair or stool, storage space), lighting, acoustics, ventilation, clothing, mattresses and linens, personal hygiene items, cleaning procedures and inspections, and fire and safety plans. *Id.* at 136a-141a. The decree also establishes detailed standards for the provision of medical and mental health care. *Id.* at 146a-161a. In addition to the sections governing correspondence (*id.* at 57a-65a), attorney visitation (*id.* at 66a-74a), and access to and the content of prison law libraries (*id.* at 80a-101a (*e.g.*, requiring typewriters, specified books, copiers)), the decree further requires "[a]dequate staff and staff training . . . to reasonably assure the safety and protection of inmates." *Id.* at 162a. It requires, among other things, that "[a]t least one correctional officer will be stationed in each

cellblock so that all inmates will have voice contact with a correctional officer at all times," that staff training be provided in accordance with specified professional standards, and that prison officials take action (as they have done) to implement the recommendations of a commissioned study of personnel needs. *Id.* at 162a-163a.

c. The foregoing provisions guarantee the prisoners' Eighth Amendment rights to the "essential human needs" of food, clothing, shelter, medical care, sanitation, and safety (*Inmates of Occoquan v. Barry*, 844 F.2d 828, 836 (D.C. Cir.), *reh'g denied*, 850 F.2d 796 (1988); see *Rhodes v. Chapman*, 452 U.S. at 348), as well as their interests (claimed under, *e.g.*, the First, Sixth, and Fourteenth Amendments) in correspondence, attorney consultation, and access to legal resources. Supplementing those provisions, however, the decree also contains extensive requirements in several other areas. It is these requirements that petitioners challenge. See Pet. App. 5a-6a (listing challenged provisions).

- *Classification* (Pet. App. 132a-135a). Security classification policies must be "guided by rational, objective standards derived from behavioral criteria" (*id.* at 132a) and must provide for the least restrictive classification and conditions compelled by security requirements (*id.* at 132a-133a). A classification may not be based solely on "arbitrary and rigid criteria such as detainers, consecutive sentences, etc.," but must be based on "an evaluation of the accumulation of identified, relevant and rational factors and standards." *Id.* at 132a. A disciplinary infraction may not result in a classification change; any such change must be based on the inmate's entire record. *Ibid.* Classification decisions must be made by a three-person committee representing the psychological staff, the program staff, and the correctional security staff, with participation by the inmate. *Id.* at 133a-134a.¹

¹ In addition, "[j]obs, program assignments, housing and services will be distributed in a rational, fair and equitable man-

• *Maximum Security* (Pet. App. 164a-172a). Except for prisoners who request such classification, maximum security may be used only where the inmate involved has himself committed, or is threatened by, particular acts disruptive of prison security,² thus making maximum security unavailable for known gang leaders who have not themselves engaged in recent misconduct. A transfer to maximum security must be based on notice and a hearing (*id.* at 166a), and alternatives must be explored and their rejection explained (*ibid.*). Although a provision of the decree that is not challenged here provides for review of maximum security status every seven days for the first two months and every 30 days thereafter,³ the decree provides for additional formal reviews and specifies rules governing the conduct of reviews and standards for continuation of maximum security status. *Id.* at 167a-168a. The decree also provides that maximum security status generally may not extend beyond a specified number of days (*id.* at 165a, 166a-168a) and that inmates in maximum security must receive five hours daily,

ner"; each inmate must be provided educational, vocational, medical, and psychological programs consistent with the decree; appropriate programs must be provided for "inmates who are drug addicts, drug abusers, alcoholics, emotionally disturbed, mentally retarded, or who pose high risks or require special protection"; and during intake and classification, inmates must be provided services (*e.g.*, correspondence, visitation, recreation) comparable to those available to the general population. Pet. App. 133a.

² Pet. App. 164a-165a: ¶ 3(a) (requiring finding of recent act of violence, destruction of property, escape, riot, or hostage taking, plus substantial threat of same or to others' safety); ¶ 3(b) (requiring findings, "based on overt acts, that an inmate presents an imminent threat of serious bodily harm to others or an imminent threat of escape"); ¶ 3(c) (requiring finding that inmate is a victim of a violent act, and a clear danger of recurrence); ¶ 3(d) (requiring finding that inmate's safety is jeopardized by "immediate life threatening conflict"); ¶ 3(e) (5-day reclassification may be based on "continuous, substantial and documented violation of institutional rules").

³ Pet. App. 167a: Maximum Security Section, ¶ 7 (first sentence).

five days a week, of "meaningful programmed activities" and two hours per week of visitation. *Id.* at 168a-169a (Maximum Security Section, ¶ 10 (all but second sentence), ¶ 11(f)).⁴

• *Inmate Discipline* (Pet. App. 173a-195a). Inmates may be punished only for certain designated offenses and only for specified lengths of time, never exceeding 30 days. *Id.* at 173a-182a.⁵ The decree contains elaborate requirements concerning the preparation of reports on inmate misconduct, 24-hour notice to the inmate, submission for supervisory review, further referral to a disciplinary officer, and hearings within specified times before a specified official or committee. *Id.* at 182a-186a. Although a provision of the decree not challenged in this case provides for all of the procedural protections mandated by *Wolff v. McDonnell*, 418 U.S. 539, 564-66 (1974),⁶ the

⁴ Those provisions are in addition to numerous guarantees that are not challenged here—concerning clothing, linens, meals, correspondence, showers, grooming, access to legal resources, retention of personal property, medical and mental health care, religious rights, and staff training, as well as a guarantee of one hour of recreation daily. Pet. App. 169a-172a: Maximum Security Section, ¶ 10 (second sentence), ¶¶ 12-21.

⁵ The decree allows, for example, no longer than 30 days in "disciplinary segregation" even for rioting, taking hostages, "unjustified killing," and escape. Pet. App. 176a. Such disciplinary action does not preclude reclassification (*id.* at 175a), but it is not itself a basis for maximum security classification. See p. 5 & note 2, *supra*.

⁶ Paragraph 12 of the *Inmate Discipline* section of the decree, which is not challenged, provides that a written record or summary of the proceedings must be kept; a tape recording of the hearing must be made; the inmate must be advised of his rights; references to confidential sources that include identifying facts must be excluded; the findings must document the specific evidence relied on and the reasons for the action taken, unless doing so would jeopardize institutional security; the inmate must have advance written notice of the charges and must be present throughout the hearing, unless his presence would jeopardize safety or he is disruptive or he has escaped; the inmate may be represented by another inmate or a staff member, make his own statement, call witnesses, and present evidence; and although reliable information from a confidential

decree goes on to lay down additional procedural rules, specifying available dispositions of charges and providing for review by the prison superintendent and by the Secretary of Corrections and Criminal Rehabilitation, with the possibility that the latter's review will be de novo. Pet. App. 190a-195a.

- *Inmate Activity* (Pet. App. 142a-145a). All prisoners except those in maximum security or disciplinary segregation are guaranteed "8 hours a day of meaningful activity." Pet. App. 145a. Petitioners must develop for each inmate, through appropriate testing and counseling, a "comprehensive program" that includes vocational training, education, and work. *Id.* at 142a. The programs must be linked to community resources where possible, and the prison's educational program must be comparable to that of the New Mexico public school system. *Ibid.* Full-time employment must generally be available to inmates. *Id.* at 144a.⁷ The prison must provide special pre-release programs. *Ibid.* All of those programs are to be provided pursuant to a comprehensive plan, including timetables, that petitioners were required to (and did) develop. *Id.* at 145a. Notwithstanding the requirement that vocational, educational, and work programs be developed and made available, "[i]nmates may refuse to participate in institutional programs except work assignments." *Id.* at 145a. *See also id.* at 134a (same exemption for maximum security inmates).

- *Double Celling and Space Requirements at New Facilities* (Pet. App. 136a-138a). Suppleemnting the requirements designed to ensure adequate conditions of living quarters, the decree prohibits housing more than one prisoner in any cell (except temporarily in dire emergencies caused by a "riot, fire, or other disaster"), regardless of

source may be used, it must be summarized for the inmate and may not be the sole basis for an adverse finding. Pet. App. 187a-190a.

⁷ Petitioners have not challenged the requirement that inmates be provided with at least one hour per day of recreational programs supervised by a full-time, qualified recreation director. Pet. App. 144a.

the size of the cell. *Id.* at 136a (Living Conditions Section, ¶ 1). Double-bunking is likewise forbidden. *Id.* at 137a (¶ 4(M)). Every dormitory must contain 60 square feet of living area per inmate. *Ibid.* (¶ 4(A)). And every cell, except for those at the original PNM facility (PNM-Main) that were in use in 1980, must be at least 60 square feet in area.⁸ These single-celling, single-bunking, and space requirements apply not only to PNM-Main and facilities operated for disciplinary segregation, maximum security, or specialized mental-health care—as to which they are not challenged—but also to the prison facilities constructed since July 1980, as to which they are challenged.⁹

• *Visitation* (Pet. App. 104a-131a). The number of visitors an inmate may receive and the length of visits may be limited only for reasons of prison scheduling, space, and personnel. *Id.* at 104a. *See id.* at 108a-110a (setting forth time and space constraints), 110a (size of visitor list). No visitor an inmate wishes to see may be excluded unless there is “clear and convincing evidence” of jeopardy to safety and security. *Id.* at 105a. Visitors may not be excluded because they are ex-offenders or have visited or are visiting other inmates. *Id.* at 105a.¹⁰ Prison officials may undertake only certain limited investigations concerning visitors and may maintain only certain limited files on visitors. *Id.* at 107a. “Contact”

⁸ As to the cells at PNM-Main, the decree provides that no prisoner may be housed in such a cell for more than 10 hours per day, except for prisoners in disciplinary segregation or maximum security status. Pet. App. 136a (¶ 2).

The decree also requires that the Secretary of Corrections maintain accurate data on the maximum number of prisoners that can be housed at PNM (under the single-celling and dormitory-space requirements) and forbids petitioners to exceed that number. Pet. App. 138a (¶ 11).

⁹ Also at issue is a provision of the Living Conditions Section (¶ 8) that requires each inmate to be provided adequate amounts of cigarettes or tobacco. Pet. App. 138a.

¹⁰ Special rules apply to inter-prison visits, which are permitted for members of the immediate family. Pet. App. 113a-115a.

visits, including kissing and embracing, must be allowed. *Id.* at 112a. With respect to searches of visitors, in addition to requiring reasonable cause (a provision not challenged here), the decree prohibits any strip search unless the "Chief Executive Officer of PNM determines that there is probable cause to believe that the particular visitor possesses contraband." *Ibid.* And with respect to searches of prisoners, although "strip shakedowns" are permitted, a visual body-cavity inspection requires reasonable suspicion that the prisoner possesses contraband (which is not created by the mere fact of a contact visit), and a manual or instrument inspection (by medical personnel) requires probable cause. *Id.* at 112a-113a.

3. *The Present Motion.* In June 1987—after years of disputes over implementation of the decree, which did not abate with the appointment in 1983 of a special master to oversee the prisons¹¹—petitioners filed the present motion, asking the district court to modify the decree by vacating the portions, described above, concerning classification, maximum security, inmate disciplines, inmate activity, and double celling and space requirements.¹² See Pet. App. 5a-6a. Petitioners argued that continued enforcement of those provisions (which, of course, supplement unchallenged provisions addressing all Eighth Amendment concerns) could not be justified in federal law, because they went far beyond the proper vindication of any federal rights, as clarified by legal developments since entry of the decree. And the provisions' continued enforcement could not be justified by state law, petition-

¹¹ The master has conducted comprehensive on-site investigations and issued more than 20 detailed compliance reports, totalling more than 2,000 pages and prompting equally extensive responsive filings by the parties. See Pet. App. 20a.

¹² Petitioners' motion also challenged a decree provision addressing decree modification. Pet. App. 54a-55a (Agreement, ¶ 6 (all but first sentence)). That provision, in addition to setting forth procedures for proposing changes in the consent decree, states that "[n]o change or changes may be made which will lessen the benefits provided by the [decree]."

ers noted, because the federal court had no jurisdiction to enforce state law against state officials, the State never having waived its sovereign immunity embodied in the Eleventh Amendment. *Pennhurst State School & Hosp. v. Halderman*, 465 U.S. 89 (1984).¹³

The district court denied the motion in its entirety, relying in part on this Court's decision in *Local No. 93 v. City of Cleveland*, 478 U.S. 501 (1986). Pet. App. 16a, 33a-34a, 41a. The court also concluded that *Pennhurst* did not bar enforcement of the contested provisions because the complaint "alleged violations of federal law" and "every substantive section of the consent decree is tied to factual allegations in the [complaint]" (*id.* at 39a). The court did not, however, consider whether the sections of the complaint corresponding to the challenged decree provisions actually stated violations of federal law (especially as that law has been clarified since 1980) or whether the decree provisions could be legitimate remedies for any such violations.¹⁴

4. *The Court of Appeals Decision.* The court of appeals affirmed. Pet. App. 1a-15a. It concluded first that the challenged provisions should not be vacated—and do not

¹³ Executive officials cannot on their own waive a State's sovereign immunity embodied in the Eleventh Amendment. *Ford Motor Co. v. Department of Treasury*, 323 U.S. 459 (1945). Any legislative waiver must be "in unmistakable language in the statute itself." *Atascadero State Hosp. v. Scanlon*, 473 U.S. 234, 243 (1985). There was no such waiver here. Indeed, the New Mexico Tort Claims Act, N.M. Stat. Ann. § 41-4-1 *et seq.*, which comprehensively addresses when and where the State may be sued, expressly reserves the State's full sovereign immunity embodied in the Eleventh Amendment. Neither the court of appeals nor the district court held to the contrary. See Pet. App. 33a n.15.

¹⁴ Having rejected petitioners' argument that modification was required as a matter of law—not only because *Pennhurst* rendered the extra-federal parts of the decree outside the court's jurisdiction, but also because principles of federalism and comity and changes of law required equitable modification, see, e.g., Memorandum In Support of June 1987 Motion at 1 & n.1, 3-10, 12 n.8, 65—the district court declined to consider equitable modification of the decree without first conducting an extensive factual hearing. Pet. App. 44a & n.27.

implicate the State's sovereign immunity under *Pennhurst*—because the provisions “[a]rguably . . . relate to, or tend to vindicate, federally protected rights.” *Id.* at 11a. Failing to mention that the decree applies not only to PNM-Main but also to three facilities that were not even opened until after the decree was entered, the court held that “each of the matters which form the basis of this case is a part of” the “totality of conditions” that respondents alleged (with respect to PNM) were unconstitutional under *Hutto v. Finney*, 437 U.S. 678, 685-89 (1978). Pet. App. 12a-13a. The court also suggested in a single footnote (*id.* at 13a n.10) that, even viewed in isolation, each of the challenged provisions vindicates a federal right, although it cited only four decisions, *Pell v. Procutner*, 417 U.S. 817 (1974); *Rhodes v. Chapman*, *supra*; *Ruiz v. Estelle*, 679 F.2d 1115 (5th Cir.), *modified*, 688 F.2d 266 (1982), *cert. denied*, 460 U.S. 1042 (1983); *Ramos v. Lamm*, 639 F.2d 559 (10th Cir. 1980), *cert. denied*, 450 U.S. 1041 (1981), none of which found measures anything like those at issue here to be constitutionally required.¹⁵

The court of appeals also held, in the alternative, that the challenged decree provisions may continue to be enforced because “even if they didn’t bear directly on federal rights, the provisions sought to be vacated come within the rule of *Local No. 93 v. City of Cleveland*, *supra*.” Pet. App. 14a. It was sufficient, in the court’s view, that the decree (1) “springs from and serves to resolve a dispute within the district court’s subject matter jurisdiction,” (2) “comes within the ‘general scope’ of the case made by [respondents] in the [complaint],” and (3) “further[s] the objectives upon which the complaint is based.” *Id.* at 14a-15a. If those three conditions were satisfied, the court ruled, the decree need not be modified

¹⁵ See note 35, *infra*. With regard to the challenged provision that purports to forbid changes in the decree that lessen benefits to respondents (see Pet. App. 5a n.6), the court of appeals concluded that the provision should not be vacated because it “concern[s] procedure, rather than substance.” *Id.* at 12a.

even if it provides "broader relief than the court might possibly have been empowered to enter after trial." *Id.* at 15a. In support, the court quoted only a portion (italicized below) of this Court's statement in *Local No. 93* that, "in addition to the law which forms the basis of the claim, *the parties' consent animates the legal force of a consent decree*" (478 U.S. at 521). Pet. App. 15a.¹⁶

REASONS FOR GRANTING THE WRIT

The issues in this case vitally affect the ability of States to administer their most basic programs, particularly their prisons, free from long-term, day-to-day federal court control over matters not governed by federal law. In requiring that state institutions be operated according to an outmoded consent decree, the court of appeals ignored fundamental principles limiting federal court power over States, disregarded well-established requirements governing the modification of consent decrees, adopted a gross misreading of *Local No. 93*, and, finally, conducted a patently inadequate examination of the federal law basis for the challenged provisions. Not only does the court's approach virtually abandon any meaningful legal limits on the role of consent decrees in ordering state-federal relations, it leaves state institutions, subject only to the district court's essentially unconstrained discretion, under close federal court supervision indefinitely and without justification in federal law.¹⁷

¹⁶ Evidently concluding that its analysis was dispositive, the court did not separately discuss petitioner's argument (C.A. Br. 36-43)—based on, e.g., *Pasadena Bd. of Educ. v. Spangler*, 427 U.S. 424 (1976), and *System Federation No. 91, Ry. Employees' Dep't v. Wright*, 364 U.S. 642 (1961)—that modification of the decree was required on grounds of post-decree changes in the law—particularly, the *Pennhurst* decision and this Court's clarification of constitutional standards governing prisoners' rights in *Rhodes v. Chapman*, *supra*, and other cases.

¹⁷ While modification of consent decrees generally lies within a district court's equitable discretion, that discretion is "'guided by sound legal principles.'" *Albermarle Paper Co. v. Moody*, 422 U.S. 405, 416 (1975) (quoting *United States v. Burr*, 25 F. Cas.

The proper standards for modification of consent decrees affect decrees governing the operation of prisons and other institutions in numerous States.¹⁸ The federal courts of appeals have adopted directly conflicting readings of *Local No. 93* and have taken inconsistent approaches to the general problem of modifying consent decrees binding States. Review by this Court is therefore warranted.

I. The Court Of Appeals Erroneously Held, Based On A Misconstruction Of *Local No. 93*, That A Federal Court May Continue To Enforce Against Objecting State Officials Provisions In A Consent Decree That Are Not Proper Remedies For Any Federal Law Violation.

In one of its alternative holdings, the court of appeals concluded, based on *Local No. 93*, that satisfaction of a three-part test requiring only a loose association between a consent decree and federal law was sufficient to justify

No. 14,492d, pp. 30, 35 (C.C. Va. 1807) (Marshall, C.J.)). It is precisely such principles that the lower courts abandoned in this case.

¹⁸ According to the ACLU National Prison Project, almost half the States currently operate some or all of their prisons under consent decrees. ACLU National Prison Project, *Status Report: The Courts and Prisons* (Apr. 17, 1989) (listing 22 such States). The issues presented here directly affect not only those decrees but additional decrees governing state mental-illness and -retardation programs. See, e.g., *Lelaz v. Kavanagh*, 807 F.2d 1243 (5th Cir.), *reh'g denied*, 815 F.2d 1034 (5th Cir.), *cert. dismissed*, 483 U.S. 1057 (1987); *New York State Ass'n for Retarded Children, Inc. v. Carey*, 706 F.2d 956 (2d Cir.), *cert. denied*, 464 U.S. 915 (1983). Moreover, because some of the issues bear closely on the standards for modifying remedial decrees that were initially contested, the present case in fact affects numerous additional States. ACLU National Prison Project, *supra* (38 States operate some or all of their prisons under judicial order).

Analogous issues concerning the enforcement of consent decrees against the federal government also have arisen with great frequency in recent years. See Rabkin & Devins, *Averting Government by Consent Decree: Constitutional Limits on the Enforcement of Settlements with the Federal Government*, 40 Stan. L. Rev. 203 (1987) (discussing cases).

continued enforcement of contested provisions against state officials. That standard, which disclaims the obligation to inquire into the federal-law basis for each enforced provision, is incorrect. And *Local No. 93* does not support it.

A. The court of appeals' lax standard violates fundamental principles governing the relations between federal courts and state governments. It is, of course, desirable and, indeed, imperative that a federal court enforce federal-law obligations against state officials. See *Ex Parte Young*, 209 U.S. 123 (1908). But by the same token, bedrock constitutional principles, such as those embodied in the Eleventh Amendment, separation of powers, and federalism, require that a federal court *not* enforce decree provisions against state officials in circumstances like the present unless each of those provisions is adequately justified as enforcing a federal-law obligation.

Thus, federal court equitable decrees against state officials must not violate a State's Eleventh Amendment sovereign immunity by including measures that cannot be justified under federal law. See *Pennhurst State School & Hosp. v. Halderman*, *supra*. Federal courts, for separation of powers reasons, must respect both their own limited ability to undertake tasks such as running a prison and, complementarily, the commitment of such tasks to the political branches of government. See *Turner v. Safley*, 107 S. Ct. 2254, 2259 (1987). Similarly, in prison cases as in other cases, "appropriate consideration must be given to principles of federalism in determining the availability and scope of equitable relief." *Rizzo v. Goode*, 423 U.S. 362, 379 (1976). This Court has often stressed those basic limits on federal judicial power, which are especially important where, as in the prison setting here, day-to-day flexibility and discretion are critical to administration.¹⁹ Yet the court of appeals ignored those

¹⁹ See, e.g., *Thornburgh v. Abbott*, 109 S. Ct. 1874, 1881 (1989); *Turner v. Safley*, 107 S. Ct. at 2262; *Whitley v. Albers*, 475 U.S. 312, 321 (1986) ("a prison's internal security is peculiarly a matter normally left to the discretion of prison administrators")

principles when, in adopting its *Local No. 93*-based standard, it declared that there was no need for a careful examination of the federal-law basis for each decree provision to be enforced against objecting state officials.²⁰

The court of appeals' lax approach cannot be justified on the ground that the decree was originally entered by consent. On the contrary, the court violated long-established principles of consent decree law in ruling otherwise. Thus, even in a private-party case, this Court has recognized that a *present* basis in federal law is required in order to warrant continued enforcement of a contested consent decree provision. In *System Federation No. 91, Ry. Employees' Dep't v. Wright*, 364 U.S. 642 (1961), a decision the court of appeals simply ignored, the Court held that vacating a now-contested consent decree was required as a matter of law where the governing legal standards at the time of the motion permitted what the consent decree prohibited.²¹ The court explained

(quoting *Rhodes v. Chapman*, 452 U.S. at 349 n.14); *Fair Assessment in Real Estate Ass'n v. McNary*, 454 U.S. 100, 111 (1981) ("scrupulous regard for the rightful independence of state governments . . . should at all times actuate the federal courts") (internal quotation marks and citations omitted); *Bell v. Wolfish*, 441 U.S. 520, 547-48 (1979); *Milliken v. Bradley*, 433 U.S. 267, 280-81 (1977) (federal court remedy must respect states' interests "in managing their own affairs"); *Rizzo v. Goode*, 423 U.S. at 378 ("[w]here, as here, the exercise of authority by state officials is attacked, federal courts must be constantly mindful of the 'special delicacy of the adjustment to be preserved between federal equitable power and State administration of its own law'") (citation omitted); *Procunier v. Martinez*, 416 U.S. 396, 404-05 (1974).

²⁰ As noted below (Section II, *infra*), when the court of appeals did discuss the federal-law basis for the contested decree provisions, that discussion was grossly inadequate.

²¹ The Court held that the district court had abused its discretion in denying the defendant union's motion to modify a consent decree that barred it from discrimination against non-union employees. The Court concluded that, whether the decree was entered by consent or after trial, it may not continue to be enforced once Congress had changed the law to permit a union shop in certain circumstances, even though there was substantial evidence of con-

that "[t]he parties have no power to require of the court continuing enforcement of rights the statute no longer gives" (*id.* at 652) and that the parties' promises did not warrant continued enforcement of the decree because "the court was not acting to enforce a promise but to enforce a statute" (*id.* at 653).²² The court of appeals' adoption of its *Local No. 93*-based standard disregards the *System Federation* ruling by denying that there is any need for careful inquiry into the present federal-law basis for an order directed at decree parties.

Important policies underlie the requirement that judicial enforcement of a consent decree, much like any other federal court injunction, be properly justified as a remedy under present federal law, and not rest only on the contractual aspect of the decree. "[A]n injunction often requires continuing supervision by the issuing court and always a continuing willingness to apply its powers and processes on behalf of the party who obtained the equitable relief"—which is so whether the decree was entered after trial or with the parties' consent. 364 U.S. at 647. *See also id.* at 651 ("The parties cannot, by giving each other consideration, purchase from a court of equity a continuing injunction."). Moreover, unlike an injunction entered over the defendant's objection, a consent decree rarely receives much judicial scrutiny on entry, as the parties and the court typically are eager to avoid protracted litigation. Thus, a modification motion may be the first occasion for careful examination of the court's authority. Further, the consent at the time of the decree is itself presumptively based on the law pre-

tinued union hostility (indeed, violence) against non-union members. 364 U.S. at 648-53.

²² Similarly, in *Pasadena City Bd. of Educ. v. Spangler*, *supra*, this Court reversed a district court's denial of a motion to modify a school desegregation decree that had been entered, after a liability holding, with the parties' consent. Relying on *System Federation*, the Court ordered modification in critical part because the decree imposed requirements that went beyond those subsequently approved by the Court in *Swann v. Charlotte-Mecklenburg Bd. of Educ.*, 402 U.S. 1 (1971). *See* 427 U.S. at 433-34, 437-38.

vailing at that time, and that law may dramatically change. See *System Federation*, 364 U.S. at 652. Finally, the benefits of settlement—both to the parties and to the courts—quickly diminish once there is no longer agreement among the parties.²³

Where, as in this case, it is a State that is bound by a decree, there are additional reasons, both practical and doctrinal, that consent cannot serve as a justification for the continued enforcement of contested provisions of consent decrees against state officials. As a practical matter, the state officeholders at the time of the decree's entry may have given their consent for reasons unrelated to the merits of the case—*e.g.*, to avoid exposure of wrongdoing or incompetence at trial; to gain a mandatory federal-court basis for the allocation of limited state resources to those officials' own programs; or to lock in their own policy choices in a manner that their successors in office, who may have different views, cannot alter.²⁴ And at

²³ Consent decrees like the present frequently erupt in disputes (as this one did immediately upon issuance) because they often do little more than establish broad, open-ended standards that generate continuing disagreements about implementation. See *United States v. Michigan*, 680 F. Supp. 928 (W.D. Mich. 1987) (reprinting 37 different enforcement orders in a consent decree case). See also *New York State Ass'n for Retarded Children, Inc. v. Carey*, *supra*; *Brewster v. Dukakis*, 675 F.2d 1 (1st Cir. 1982). The systemic benefits of consent decrees are accordingly far less than they might seem. At the same time, the systemic costs to the courts of continuing enforcement of decrees not justified by applicable law may be considerable. See *Kasper v. Board of Election Comm'rs*, 814 F.2d 332, 341 (7th Cir. 1987) (“[e]very hour consumed administering a consent decree is an hour taken from other litigants, who must wait in a longer queue”); *Sansom Comm. v. Lynn*, 735 F.2d 1535, 1544 (3d Cir. 1984) (Becker, J., concurring) (stressing need for “a principled basis for limiting the range of disputes into which the federal courts can be dragged by means of an overly broad consent decree”).

²⁴ See *Kasper v. Board of Election Comm'rs*, 814 F.2d at 340 (“district judges should be on the lookout for attempts to use consent decrees to make end runs around the legislature”); Easterbrook, *Justice and Contract in Consent Judgments*, 1987 Univ. of Chicago

the level of constitutional doctrine, this Court's case law under the Contract Clause—the provision of the Constitution that is specifically concerned with federal insistence on States' compliance with their contracts—has long declined to give federal-law protection to contracts in which state officeholders seek to bind the State to a particular exercise of traditional governmental powers.²⁵ There is no sound reason for the federal courts to give any greater federal-law force to the contractual aspect of a consent decree that constrains the exercise of state governmental powers, such as those concerning prison administration.²⁶

For those reasons, a consent decree binding state officials should not be enforced over their objection to the extent it goes beyond the relief that would be available under federal law after a trial. At a minimum, however,

Legal Forum 19, 33 ("The separation of powers inside a government—and each official's concern that he may be replaced by someone with a different agenda—creates incentives to use the judicial process to obtain an advantage. The consent decree is an important element in this strategy."); Note, *Federalism and Federal Consent Decrees Against State Governmental Entities*, 88 Colum. L. Rev. 1796, 1806 (1988) (citing sources).

²⁵ The Court stated in *Stone v. Mississippi*, 101 U.S. 814, 820 (1879):

[T]he power of governing is a trust committed by the people to the government, no part of which can be granted away. The people, in their sovereign capacity, have established their agencies for the preservation of the public health and the public morals, and the protection of public and private rights. These several agencies can govern according to their discretion . . . while in power; but they cannot give away nor sell the discretion of those that are to come after them, in respect to matters the government of which, from the very nature of things, must 'vary with varying circumstances.'

See also *United States Trust Co. v. New Jersey*, 431 U.S. 1, 23-24 (1977); *El Paso v. Simmons*, 379 U.S. 497, 508-09 (1965); *Home Building & Loan Ass'n v. Blaisdell*, 290 U.S. 398, 434-38 (1934); Rabkin & Devins, *supra*.

²⁶ Under *Pennhurst*, of course, whether the consent decree has force as an agreement under state law is not an issue for the federal court.

a federal court considering state officials' motion to modify a consent decree must examine each contested provision to determine that it is properly tied to the protection of federal rights. Any lesser standard would lead to continued enforcement of decree provisions that are incompatible with the constitutional limits on federal judicial authority and, in a case like this, to "unnecessarily perpetuat[ing] the involvement of the federal courts in affairs of prison administration." *Turner v. Safley*, 107 S. Ct. at 2262 (quoting *Procunier v. Martinez*, 416 U.S. at 407).

B. This Court's decision in *Local No. 93* does not support the court of appeals' ruling that decree provisions may be enforced even if they are not proper remedies for federal-law violations. To begin with, the Court in *Local No. 93* decided only a narrow statutory issue. The Court ruled that entry of an affirmative action consent decree was outside the coverage of § 706(g) of the Civil Rights Act of 1964, 42 U.S.C. § 2000e-5(g), because that provision, which limits what measures an "order of the court" may "require" of employers, does not cover an employer's voluntarily adopted practices. See 478 U.S. at 513, 515, 517 n.8. Acknowledging that consent decrees generally have a dual order/contract character,²⁷ the Court held no more than that the contractual aspect was dominant for purposes of § 706(g). The Court did not extend that holding to any other setting.

Moreover, as its narrow § 706(g) holding makes clear, the Court in *Local No. 93* did not, as the court below supposed, establish a three-part test that, if satisfied, automatically permits all consent decrees to exceed the scope of permissible post-trial relief. Rather, in rejecting the claim that no consent decree may exceed a post-trial order, the Court concluded only that "a federal court is not necessarily barred from entering a consent decree merely because the decree provides broader relief than the

²⁷ "[I]n addition to the law which forms the basis of the claim, the parties' consent animates the legal force of a consent decree." 478 U.S. at 525.

court could have awarded after a trial.” 478 U.S. at 525 (emphasis added).²⁸ Thus, the three requirements set forth by the Court were, by their terms, only necessary—not sufficient—conditions for a consent decree’s validity. Indeed, the Court explained that, even if a consent decree met the three necessary conditions, it might “otherwise [be] shown to be unlawful.” 478 U.S. at 526.²⁹

In any event, whatever *Local No. 93* decided for the situation before it, that decision plainly does not speak to the present context. *Local No. 93* involved only the entry of a consent decree; unlike the present case, it did not involve a refusal to modify a decree.³⁰ *Local No. 93* involved a defendant that enthusiastically embraced the decree; unlike the present case, it did not involve defendants who are affirmatively seeking modification (and hence the question of post-decree changes of law could not have arisen in *Local No. 93*). Finally, *Local No. 93* involved a city employer as defendant—which, in fact,

²⁸ The general discussion in *Local No. 93* that was relied on by the court of appeals merely rejects the broad argument that § 706(g) should be construed to cover entry of a consent decree because of the “general principle that a consent decree cannot provide greater relief than a court could have decreed after a trial.” 478 U.S. at 524.

²⁹ The Court did not consider other constraints on consent decrees in the Title VII context or in other contexts. It did not even consider whether the consent decree at issue violated the basic anti-discrimination prohibitions of Title VII or of the Fourteenth Amendment. See 478 U.S. at 517 n.8; *id.* at 530 (O’Connor, J., concurring).

³⁰ The Court in *Local No. 93* itself recognized that the standards governing entry of a decree were different from the standards governing modification. It noted that, while entry of a consent decree does not implicate § 706(g) of Title VII, a ruling on a motion to modify a consent decree does implicate § 706(g). 478 U.S. at 523 n.12. And the Court carefully distinguished from the entry case before it (478 U.S. at 526-28) two decisions that involved motions to modify—*System Federation No. 91, Ry. Employees’ Dep’t v. Wright*, *supra*, and *Firefighters Local Union No. 1784 v. Stotts*, 467 U.S. 561 (1984).

the Court treated as if it were a private employer;³¹ unlike the present case, it did not involve objecting state officials as defendants, and therefore it implicated none of the special constitutional concerns at issue here. The court of appeals ignored those critical distinctions in blindly relying on *Local No. 93* as authority for the district court's refusal to modify the consent decree without any serious inquiry into whether the contested provisions are proper current federal-law remedies.

II. The Court Of Appeals Erroneously Concluded That The Challenged Consent Decree Provisions Were Legitimate Federal Law Remedies.

The court of appeals also held, as an alternative ground for its decision, that every one of the challenged provisions of the consent decree was sufficiently based in federal law. Pet. App. 12a-13a & nn.9, 10. For that reason, the court concluded, continued enforcement of the entire decree did not run afoul of *Pennhurst's* prohibition on federal court enforcement of state law against state officials. Pet. App. 14a. Both the court's analysis and its conclusion are in error.

A. To begin with, as this Court's decisions in *System Federation, supra*, *Pasadena Bd. of Educ. v. Spangler, supra*, and other cases establish, a federal court may not treat a decree, once entered, as perpetual. Rather, the court is required to examine the changes in law that have taken place since entry of the consent decree and to determine whether those changes have undermined the bases for the challenged provisions. But the court below neither adverted to the change-of-law doctrine nor undertook any such examination. That failure is wholly inexplicable, because the parties entered into the consent decree on certain assumptions about the applicable law that have since proven false. Notably, while the parties agreed to

³¹ There was no reason to distinguish different kinds of defendants in *Local No. 93*, because the § 706(g) question is the same regardless of the nature of the employer. Notably, the Court in *Local No. 93* did not cite a single decision involving a consent decree binding a state defendant.

the decree on the assumption that some provisions could rest on state law,³² this Court later decided in *Pennhurst* that federal courts may not enforce state-law obligations against state officials. This Court's decision in *Rhodes v. Chapman*, *supra*, also post-dates the July 1980 decree; and that decision, both in its rejection of a single-celling requirement and in its general clarification (and limiting) of Eighth Amendment requirements for prison conditions, has widely been recognized to have been, as Judge Starr said for the D.C. Circuit, "a ground-breaking decision." *Inmates of Occoquan v. Barry*, 844 F.2d at 835. See *Newman v. Graddick*, 740 F.2d 1513, 1520-21 (11th Cir. 1984); *Nelson v. Collins*, 659 F.2d 420, 429 (4th Cir. 1981) (en banc) (directing modification of single-celling requirement after *Rhodes*).³³ The court below completely ignored those changes.

Second, the court of appeals relied primarily on the conclusion, unsupported by analysis of each particular challenged provision, that all of the provisions were justified as remedies for the alleged "totality of conditions" violation. Pet. App. 12a-13a. This notion is utterly insupportable. There was not, and could not have been, any unconstitutional "totality of conditions" at three of the four prisons to which the decree applies—the three that opened after the decree was entered. In any event, as the Fifth Circuit explained in *Ruiz v. Estelle*, 679 F.2d at 1140 n.98, 1153, "a generalized and 'vague conclusion' concerning the totality of conditions is insufficient": "The 'totality of the circumstances' test does not authorize [a federal court] to reform all deficient prison conditions.

³² The inmate activity section expressly proclaims its foundation in state law alone. Pet. App. 142a. And the classification section of the complaint states that the alleged deficiencies in classification are state-law deficiencies. *Id.* at 201a.

³³ Also post-dating the July 1980 decree was the Tenth Circuit's own leading decision on prison conditions, *Ramos v. Lamm*, *supra*, which greatly limited available Eighth Amendment relief and reversed provisions of a district court decree similar to many of those challenged here.

The remedy must be confined to the elimination of those conditions that together violate the Constitution." Otherwise, under the Tenth Circuit's approach, *any* condition, presumably at any prison, could be included in a federal court order once the totality of conditions concerning the "essential human needs" addressed by the Eighth Amendment was found wanting at one prison—and that would be so even if, as here, all of the Eighth Amendment requirements of food, clothing, shelter, sanitation, medical care, and safety have already been addressed.³⁴

Third, the court made no serious attempt to tie each of the challenged decree provisions to federal law but rested instead on summary assertions in a single footnote. Pet. App. 13a n.10. That offhand approach is wholly inadequate to ensure the presence of the essential predicate, under *Ex Parte Young*, *supra*, for permitting a federal court injunction against state officials—that such an injunction is truly "necessary to permit the federal courts to vindicate federal rights" (*Pennhurst*, 465 U.S. at 105). Nor can it ensure that each provision of the decree complies with the important separation of powers and federalism constraints on federal court injunctions against state prison officials. *See* pp. 15-16, *supra*. In fact, the court of appeals merely cited four decisions, which either do not speak to the types of measures at issue here or, to the extent they do, actually hold that such measures are not constitutionally required.³⁵

³⁴ In *Hutto v. Finney*, *supra*, which was relied on by the court below, this Court upheld a 30-day limit on punitive placement in isolation cells where the cruel and unusual conditions of the isolation cells themselves (food, sanitation, space) had not been cured. 437 U.S. at 687. The measure upheld was thus directly related to the totality of conditions that are of Eighth Amendment concern. In that regard, the Court indicated that the time limit could be removed if the deficiencies in provision for basic inmate needs were corrected. *Id.* at 687 n.9.

³⁵ Thus, *Pell v. Procunier*, *supra*, upheld more restrictive visitation policies than those at issue here. *Rhodes v. Chapman*, *supra*, rejected a single-celling requirement and, stressing deference to prison officials' discretion, held that the Eighth Amendment addressed only the "basic human needs" of food, clothing, shelter,

B. There is, of course, considerable case law addressing the constitutional basis for the contested provisions in this case. That law, simply ignored by the Tenth Circuit, demonstrates that the challenged provisions of the consent decree have no solid foundation in federal law. Especially in light of the unchallenged provisions governing every aspect of prison conditions covered by the Eighth Amendment, the substantial intrusions on state prison administration are unjustified.

Thus, the Constitution does not speak to prisoners' proper security classifications; much less does it require use of a "least restrictive alternative" principle, bar use of specified substantive security criteria, forbid use of maximum security except for prisoners who have personally committed or are personally threatened by violence, or set limits on the permissible time of maximum security classification. Pet. App. 132a-135a, 164a-172a. (Indeed, respondent's complaint expressly referred to state law as the source of its claims concerning classification practices. *Id.* at 201a.) To the contrary, this Court has stressed that "a prison's internal security is peculiarly a matter normally left to the discretion of prison administrators." *Rhodes v. Chapman*, 452 U.S. at 349 n.14; see *Whitley v. Albers*, 475 U.S. at 321-22.³⁶ And where, as here, there

medical care, sanitation, and safety. *Ramos v. Lamm*, *supra*, rejected a claim—based on a record showing grossly inadequate conditions in a prison that recently incurred a major riot—that classification, idleness, and inmate motility were properly included in an Eighth Amendment remedy. And *Ruiz v. Estelle*, *supra*, overturned single-celling and 60 square foot space requirements and examined each provision of the remedy to determine which portions were truly necessary.

³⁶ No decision of this Court supports, and the courts of appeals uniformly have rejected, classification standards like those challenged here. See *Walker v. Mintzes*, 771 F.2d 920, 933-34 (6th Cir. 1985); *Jones v. Mabry*, 723 F.2d 590, 594 (8th Cir. 1983), *cert. denied*, 467 U.S. 1228 (1984); *Jackson v. Meachum*, 699 F.2d 578, 583 (1st Cir. 1983); *Hoptowit v. Ray*, 682 F.2d 1237, 1255-56 (9th Cir. 1982); *Gibson v. Lynch*, 652 F.2d 348, 352 (3d Cir. 1981), *cert. denied*, 462 U.S. 1137 (1983); *Young v. Wainwright*, 449 F.2d

is no enforceable entitlement to particular classifications in state law, prisoners have no due process procedural rights, let alone the formal procedural rights at issue here. See *Hewitt v. Helms*, 459 U.S. 460, 468 (1983); *Levoy v. Mills*, 788 F.2d 1437, 1440 (10th Cir. 1986).

Similarly, the Eighth Amendment not only leaves prison officials broad discretion to decide what conduct warrants inmate discipline (see *Rhodes v. Chapman*, 452 U.S. at 349 n.14; *Leonard v. Norris*, 797 F.2d 683, 685 (8th Cir. 1986); *Rivera v. Toft*, 477 F.2d 534, 536 (10th Cir. 1973)), but does not prescribe the duration of penalties like punitive segregation, as long as basic rights to food, sanitation, health, and safety are protected.³⁷ Moreover, given the unchallenged provisions (Pet. App. 187a-190a) that fully meet all due process requirements of *Wolff v. McDonnell*, 418 U.S. at 564-66, there is no constitutional basis for the decree's additional procedural requirements for inmate discipline (Pet. App. 190a-195a).

The costly inmate activity requirements (Pet. App. 142a-145a) likewise have no basis in federal law, as the decree itself attests. Those provisions are expressly based on state law. *Id.* at 142a.³⁸ And this Court in *Rhodes v. Chapman*, 452 U.S. at 348, made clear that deprivation of desirable programs, such as educational and vocational

338, 339 (5th Cir. 1971). See also *Ramos v. Lamm*, 639 F.2d at 566-67 (reversing classification requirements).

³⁷ See *Hutto v. Finney*, 437 U.S. at 685-86 (1978); *Jackson v. Meachum*, 699 F.2d at 583; *Sostre v. McGinnis*, 442 F.2d 178, 192-93 (2d Cir. 1971), *cert. denied*, 404 U.S. 1049 (1972). Isolation lasting much longer than the 30 days allowed here (Pet. App. 174a-182a) has been upheld. See, e.g., *Ross v. Reed*, 719 F.2d 689, 697 (4th Cir. 1983) (3 months); *Fitzgerald v. Procunier*, 393 F. Supp. 335, 342 (N.D. Cal. 1975) (9 months). In the present case, of course, inmates' rights to food, sanitation, etc., are fully protected by decree provisions that are not challenged.

³⁸ The Inmate Activity Section of the Decree begins: "One part of the [state] statutory mandate to the Department of Corrections and Criminal Rehabilitation is to 'try to rehabilitate' offenders committed to its custody and care. This statutory mandate will be implemented through the following policies and procedures:." Pet. App. 142a.

programs, "do not inflict pain, much less unnecessary and wanton pain; deprivations of this kind simply are not punishments" and so cannot be "cruel and unusual" punishments violative of the Eighth Amendment. *See also Battle v. Anderson*, 788 F.2d 1421, 1426-27 (10th Cir. 1986); *Ramos v. Lamm*, 639 F.2d at 566-67.

The flat ban on double celling (Pet. App. 136a)—which is not challenged with respect to the original PNM facility or facilities used for disciplinary segregation, maximum security, or specialized mental-health care—is equally unjustified in federal law. *Rhodes v. Chapman*, 452 U.S. at 348, held that there is no constitutional ban on double celling as long as the conditions of the cells are constitutionally adequate, as they are guaranteed to be here by unchallenged provisions of the decree.³⁹ Indeed, the only cells at issue all were built in recent years and contain between 80 and 121 square feet of living space, which is roughly 30-90% more than the 63 square feet that the Court approved for double celling in *Rhodes v. Chapman*.⁴⁰

Finally, the visitation policies prescribed by the decree (Pet. App. 104a-131a) constrain prison officials' discretion more tightly than required by federal law. *See Pell v. Procunier*, *supra* (upholding more restrictive visitation policies and requiring only that visitation policies not be inconsistent with legitimate penological objectives, including security); *Turner v. Safley*, *supra* ("reasonably related" standard). For example, there is no sound justification for requiring that petitioners allow visits by ex-felons or persons also visiting other inmates, or for applying a "clear and convincing evidence" standard for

³⁹ *See Union County Jail Inmates v. DiBuono*, 713 F.2d 984, 1001 (3d Cir.), *reh'g denied*, 718 F.2d 1247 (1983), *cert. denied*, 465 U.S. 1102 (1984); *Smith v. Fairman*, 690 F.2d 122, 125-26 (7th Cir. 1982), *cert. denied*, 461 U.S. 946 (1983); *Ruiz v. Estelle*, 679 F.2d at 1146; *Nelson v. Collins*, 659 F.2d at 428.

⁴⁰ The 60 square foot per prisoner requirements (Pet. App. 136a, 137a) are for the same reason without constitutional foundation.

denying visitation rights. Pet. App. 104a, 105a. Nor is there a constitutional right to "contact visits" (*id.* at 112a). See, e.g., *Block v. Rutherford*, 468 U.S. 576 (1984); *Toussaint v. McCarthy*, 801 F.2d 1080, 1113 (9th Cir. 1986), *cert. denied*, 481 U.S. 1069 (1987). And the challenged rules limiting searches (Pet. App. 112a-113a) are unduly restrictive under *Bell v. Wolfish*, 441 U.S. 520 (1979). See, e.g., *Goff v. Nix*, 803 F.2d 358, 369 (8th Cir. 1986), *reh'g denied*, 809 F.2d 530 (8th Cir.), *cert. denied*, 484 U.S. 835 (1987); *Campbell v. Miller*, 787 F.2d 217, 228 (7th Cir.), *cert. denied*, 479 U.S. 1019 (1986); *Arruda v. Fair*, 710 F.2d 886, 888 (1st Cir.), *cert. denied*, 464 U.S. 999 (1983).⁴¹

III. The Standards For Modification Of Consent Decrees Binding State Officials Have Divided The Courts Of Appeals And Present Important Questions Requiring This Court's Review.

Review is also warranted in this case because the present court of appeals decision is inconsistent with decisions of other courts of appeals. On the proper interpretation of this Court's decision in *Local No. 93*, there is a square conflict. The Second Circuit has agreed with the court below that *Local No. 93* establishes sufficient conditions, not requiring substantial inquiry into the federal-law basis for contested decree provisions, for refusing to modify a consent decree against state officials. *Kozlowski v. Coughlin*, 871 F.2d 241 (1989), *quoted at* Pet. App. 15a. The Fifth Circuit, by contrast, has squarely rejected that view, holding that *Local No. 93* does not apply to a motion to modify a consent decree against state officials. *Lelsz v. Kavanagh*, 807 F.2d 1243, 1252, *reh'g denied*, 815 F.2d 1034, *cert. dismissed*, 483 U.S. 1057 (1987).

⁴¹ The decree provision that purports to forbid any decree modification that would lessen benefits to prisoners (*see* note 12, *supra*)—if, as it would seem, it is more than purely procedural—cannot be supported in federal law. One set of state officeholders may not limit the rights to modification that their successors would otherwise have under generally applicable legal principles.

Moreover, the courts of appeals have taken fundamentally inconsistent approaches to—and reached fundamentally inconsistent results concerning—the modification of consent decrees against state officials in cases quite similar to the present one. For example, the Fifth Circuit in *Lelsz v. Kavanagh*, *supra*, vacated several provisions of a consent decree against state officials, undertaking precisely the sort of careful examination of the federal law basis for each particular contested decree provision that the Tenth Circuit in this case failed to conduct. The court explained that the Eleventh Amendment and “the principles of federalism and comity which animate the Eleventh Amendment” demonstrate that “the only legitimate basis for federal court intervention . . . is the vindication of federal rights.” 807 F.2d at 1252. It followed the directive of *System Federation* that “a consent decree must be modified to adjust to changes in governing law.” 807 F.2d at 1254. And it concluded that the provisions were not closely enough tied to federal rights, even though, as the court recognized, the provisions at issue might have been included as prophylactic protections of federal rights. See 807 F.2d at 1248 & n.6; see also *id.* at 1256 (Wisdom, J., dissenting); 815 F.2d 1034 (dissent from denial of rehearing en banc).

The Ninth Circuit took the same careful approach in *Washington v. Penwell*, 700 F.2d 570 (1983), vacating certain provisions of a consent decree concerning legal services for inmates on the ground that “defendants [had] agreed to do more than constitutionally required” (*id.* at 574). The court explained: “The district court could not have entered an involuntary decree requiring state officials to do more than the minimum needed to conform with federal law. . . . Similarly, the district court’s authority to adopt a consent decree comes only from the law the decree is intended to enforce.” *Ibid.* (citations omitted). Consequently, the court said, “[t]he draconian standards applicable to requests for modification of consent decrees against private parties

... cannot apply here or the court would run afoul of the state's sovereign immunity." *Ibid.* (citations omitted). See also *Nelson v. Collins*, *supra* (4th Cir.) (following *System Federation*, court required modification of both contested and consent decrees in prison case, based on intervening change of law in *Rhodes* and on new factual circumstances that State had new prisons); *Ruiz v. Estelle*, *supra* (5th Cir) (rejecting crude "totality of circumstances" approach to justifying remedies addressed to any prison-condition measure, and reversing double-celling requirement).

This Court should establish uniform principles recognizing necessary limits on federal courts' authority to maintain control over state institutions through consent decrees.

CONCLUSION

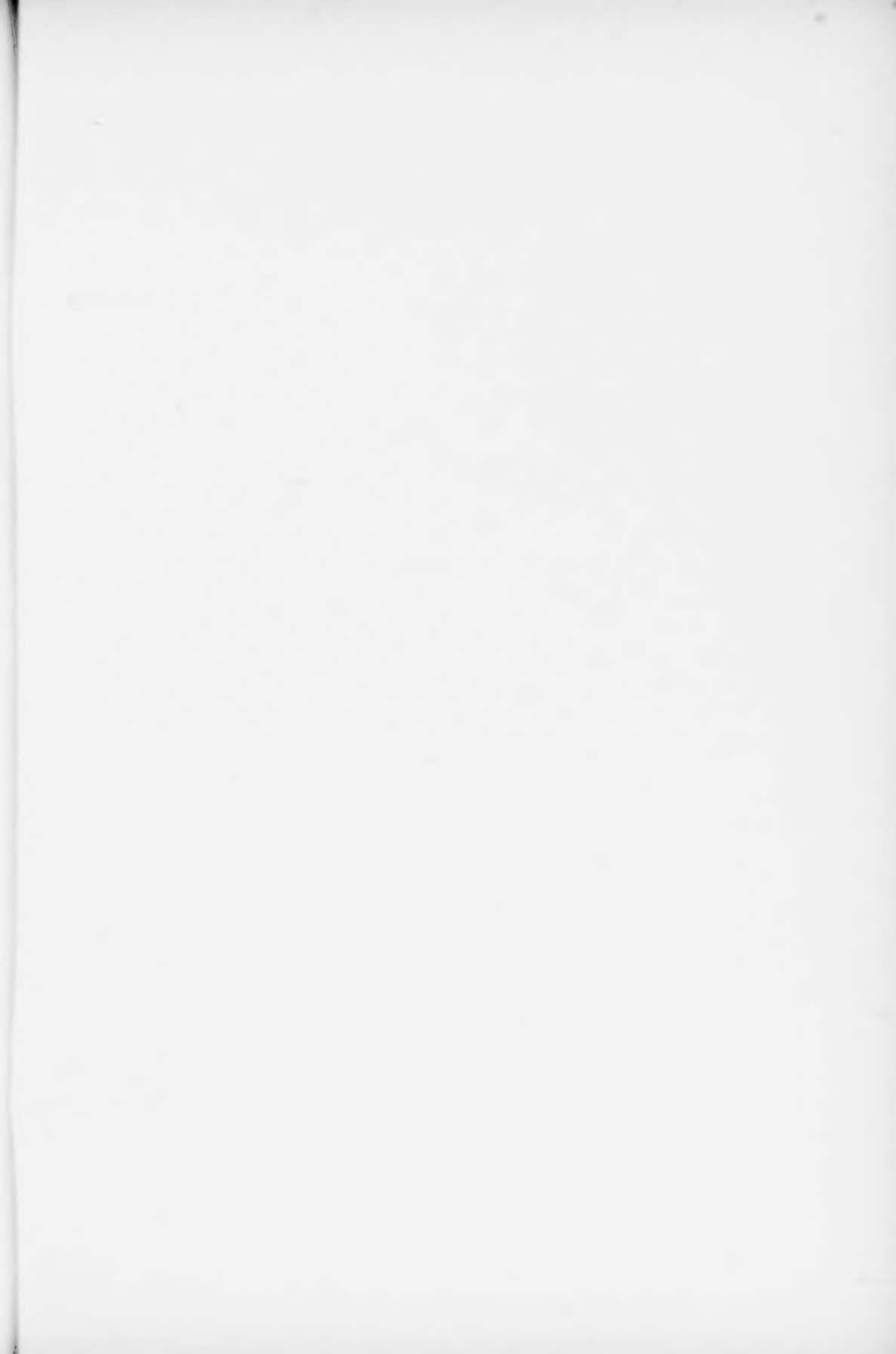
The petition for a writ of certiorari should be granted.

Respectfully submitted,

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89-786

No.

FILED

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JOSEPH F. SPANIOLO, JR.
CLERK

IN THE
Supreme Court of the United States

OCTOBER TERM, 1989

GARREY CARRUTHERS, GOVERNOR OF NEW MEXICO,
O.L. McCOTTER, SECRETARY OF CORRECTIONS, and
ROBERT J. TANSY, WARDEN OF THE
PENITENTIARY OF NEW MEXICO,
Petitioners,

v.

DWIGHT DURAN, LONNIE DURAN, SHARON TOWERS,
and ALL OTHERS SIMILARLY SITUATED

APPENDIX TO
PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

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APPENDIX A

UNITED STATES COURT OF APPEALS
TENTH CIRCUIT

No. 88-1442

DWIGHT DURAN, LONNIE DURAN, SHARON TOWERS, and
all others similarly situated,
Plaintiffs-Appellees,

v.

GARREY CARRUTHERS, GOVERNOR OF THE STATE OF NEW
MEXICO, O.L. MCCOTTER, SECRETARY OF CORRECTIONS,
and ROBERT J. TANSY, WARDEN OF THE PENITENTIARY
OF NEW MEXICO,
Defendants-Appellants.

and

MOUNTAIN STATES LEGAL FOUNDATION, Amici Curiae, on
behalf of its members, the State of Kansas, and the
State of Utah.

and

Amici Curiae of the STATES OF HAWAII, OREGON, UTAH,
WASHINGTON, and WYOMING, in support of Appellants.

Appeal from the United States District Court
For the District of New Mexico
(D.C. Civil No. 77-0721-JB)

[Filed Sept. 15, 1989]

Joel I. Klein of Onek, Klein & Farr, Washington, D.C. (Hal Stratton, Attorney General, Henry M. Bohnhoff, Deputy Attorney General, James Bieg, Assistant Attorney General, Santa Fe, New Mexico; Norman S. Thayer, Saul Cohen, and Stephany S. Wilson of Sutin, Thayer & Browne, Albuquerque, New Mexico; and Paul M. Smith of Onek, Klein & Farr, Washington, D.C., with him on the brief), for Defendants-Appellants.

Elizabeth Alexander, Washington, D.C. (Mark J. Lopez and Alvin J. Bronstein, National Prison Project of the ACLUF, Inc., Washington, D.C.; Ray Twohig, P.C., Albuquerque, New Mexico; and Mark H. Donatelli of Rothstein, Bailey, Bennett, Daly & Donatelli, Santa Fe, New Mexico, with her on the brief), for Plaintiffs-Appellees.

Paul Farley, Mountain States Legal Foundation, Denver, Colorado; Robert T. Stephan, Attorney General, State of Kansas, Topeka, Kansas; and David L. Wilkinson, Attorney General, State of Utah, Salt Lake City, Utah, Attorneys for the Amici Curiae, on behalf of the Mountain States Legal Foundation, its members, the State of Kansas, and the State of Utah.)

(Warren Price, III, Attorney General, State of Hawaii, and Steven S. Michaels, Deputy Attorney General, Honolulu, Hawaii; Dave Frohnmayer, Attorney General, State of Oregon; David L. Wilkinson, Attorney General, State of Utah; Kenneth O. Eikenberry, Attorney General, State of Washington; and Joseph B. Meyer, Attorney General, State of Wyoming, Attorneys for the Amici Curiae States of Hawaii, Oregon, Utah, Washington, and Wyoming.)

Before SEYMOUR, EBEL, and McWILLIAMS, Circuit Judges.

McWILLIAMS, Circuit Judge.

This appeal is from an order of the United States District Court for the District of New Mexico denying the defendants' motion to vacate certain parts of a consent decree.¹ Our study of the matter convinces us that the district court did not err in denying defendants' motion to vacate. Accordingly, we affirm.

By a first amended complaint filed July 6, 1978, Dwight Duran, and others, all inmates of the Penitentiary of New Mexico ("PNM"), instituted a class action charging that conditions in the penitentiary violated rights guaranteed them by the United States Constitution and by federal statutes.² Jurisdiction was based on 28 U.S.C. § 1331. Named as defendants were the following:

1. Hon. Jerry Apodaca, Governor of the State of New Mexico;
2. Charles Becknell, Secretary of Criminal Justice for the State of New Mexico;³
3. Edwin Mahr, Director of the Corrections Division for the State of New Mexico;
4. Levi Romero, Warden of the Penitentiary of New Mexico;

¹ The district court's Memorandum Opinion and Order was published and appears as *Duran v. Carruthers*, 678 F. Supp., 839 (D.N.M. 1988). The background chronology is fully set forth therein and will not be repeated in great detail here.

² The first amended complaint also set forth in a second and third claim violations of the New Mexico state constitution, and New Mexico state statute. A fourth claim for relief alleged violations of the United States Law Enforcement Assistant Administration, 49 U.S.C. § 3750(b). However, none of these claims plays any role in the present proceeding.

³ The Secretary of Criminal Justice is appointed by the Governor.

5. Robert Montoya, a Deputy Warden of the Penitentiary of New Mexico; and

6. Joseph Lujan, a Deputy Warden of the Penitentiary of New Mexico.⁴

Partial consent agreements, covering visitation, access to legal services, and food services, were signed by the parties in 1979, and orders reflecting the agreements were entered by the court. Those partial consent decrees are not the subject of this appeal. In February, 1980, a bloody riot occurred in the Penitentiary of New Mexico in which twelve correctional officers were taken hostage, thirty-three inmates were killed, at least ninety were seriously injured, and damage to the prison facilities measured in the millions of dollars.

In this general setting the parties entered into a consent decree which was approved by the district court on July 14, 1980. This negotiated decree was elaborate, extending well over 100 printed pages, and by its provisions regulated many aspects of the prison operation. In provisions not challenged in the present proceeding, the decree comprehensively regulates the defendants' conduct in the penitentiary in the area of (1) food services, (2) physical facilities, including clothing and personal hygiene items provided to inmates, (3) medical care, (4) mental health care, (5) correspondence between inmates and outsiders, (6) access to legal resources, and (7) attorney-client visitations.

On June 12, 1987, the Attorney General for the State of New Mexico filed a motion to vacate seven parts of the 1980 consent decree.⁵ The motion was filed on behalf of the Hon. Garrey Carruthers, who was then the Gov-

⁴ All defendants were represented in the district court by the Attorney General for New Mexico.

⁵ An earlier motion to vacate the 1980 consent decree in its entirety was withdrawn.

ernor of New Mexico, and on behalf of the other individuals named as defendants in the amended complaint, or their successors. The motion to vacate was signed not only by the state's Attorney General, but also by private counsel located in Albuquerque, New Mexico and Washington, D.C.

Specifically, the defendants moved to vacate the following portions of the 1980 consent decree:

1. Paragraph 6 in the July 14, 1980 Agreement, except for the first sentence.⁶

2. Paragraphs 1 through 15 in the "Classification" section of the consent decree.

3. Paragraphs 1 through 10, except for the first sentence of paragraph 7 and the second sentence of paragraph 10 and paragraph 11(f) in the "Maximum Security" section of the decree.

⁶ 6. Other than in times of emergency, changed circumstances may, in the future, justify some changes in this agreement and the policies attached hereto and the partial consent decrees on file herein. No change or changes may be made which will lessen the benefits provided by the agreement and the policies attached hereto and the partial consent decrees on file herein. Notice will be given to the lawyers for the Plaintiffs at least thirty (30) days prior to the proposed implementation date. Said notice will contain the proposed change or changes and the reasons therefore. Counsel for the Plaintiffs will ascertain whether, in their opinion, the proposed change or changes in any way lessen the benefits provided by this agreement or the policies attached hereto and the partial consent decrees on file herein. If so, they will notify Defendants of their objections and the reasons therefore within fifteen (15) days. Efforts will be made to informally resolve the matter. If the dispute cannot be resolved, it will be submitted to the court. The burden will then be on the Defendants to justify that the change or changes should be made and will not lessen the benefits provided by the agreement and the policies attached hereto and the partial consent decrees on file herein before the change or changes will be allowed.

4. Paragraphs 1 through 11 and 14 through 18 of the "Inmate Discipline" section of the decree.

5. Paragraphs 1 through 7, 9 through 12, 14 through 18 and the prologue of the "Inmate Activity" section of the decree.

6. Paragraphs 1, 2, 4(A) and 4(M), except as they apply to inmates housed in the PNM-Main, or facilities operated for specialized mental-health care, maximum security or disciplinary segregation, paragraph 8, as it applies to provision of cigarettes and tobacco, and paragraph 11 as such appears in the "Living Conditions" section of the decree.

7. Paragraphs 1 through 10, 11(E), 13 through 15, plus the probable cause provision in paragraph 11(D) and the probable cause and reasonable suspicion requirements in paragraph 12 in the "Visitation" section of the decree.⁷

Defendants' basic position is that the portions of the consent decree which they seek to vacate are not directly related to federally created rights nor do they tend to vindicate federal rights. Rather, the defendants argue that at best they may relate to, and vindicate, rights created by the State of New Mexico, and that some others relate only to better penological practices. Such remedies, according to the defendants, are beyond the reach of a federal district court, and should therefore

⁷ In greater detail, the contested provisions (1) requires appellants to follow specified procedures and criteria in classifying inmates to different security levels, and severely restricts both the amount of time and the circumstances in which they may use the "maximum security" classification; (2) sets out the exclusive list of actions that may form the basis for inmate discipline, as well as the maximum penalties; (3) mandates that eight hours of vocational or educational activity per day be made available to each inmate; (4) prohibits, in all prisons and under all circumstances, the housing of two inmates in the same cell; and (5) comprehensively regulates the prison policies on visitations, including the types of searches that may be made in relation to such visits.

be removed from the consent decree. In this argument, defendants place considerable reliance on *Pennhurst State School and Hospital v. Halderman*, 465 U.S. 89 (1984), where the Supreme Court held that the Eleventh Amendment prohibited a federal district court from ordering state officials to conform their conduct to state law.

At the outset it should be remembered that in the instant case there was no trial. We have a first amended complaint filed July 6, 1978, followed by several partial consent decrees in 1979, culminating in an elaborate and all-encompassing final consent decree on July 14, 1980. Consequently, the first amended complaint should be our starting point.

In a "preliminary statement" to the first amended complaint the plaintiffs contend that "the totality of the overcrowding and other conditions at PNM fall beneath standards of human decency, inflict needless suffering on prisoners and create an environment which threatens prisoners' mental and physical well-being and results in physical and mental deterioration and debilitation of the prisoners confined therein, which is both unnecessary and penologically unjustifiable." By further prefatory statement, the plaintiffs asked the district court, after hearing, to declare that the totality of prison conditions are unconstitutional under the Constitutions of the United States and New Mexico and in violation of the statutes of the United States and New Mexico.

The plaintiffs' first claim for relief was filed under 42 U.S.C. § 1983 to redress injuries suffered by the plaintiffs, and the class they sought to represent, for deprivation by the defendants of rights secured the plaintiffs by the first, sixth, eighth, ninth and fourteenth amendments to the United States Constitution. Specific constitutional rights allegedly violated by the defendant were the rights to be free from cruel and unusual punishment, to due process, to religious freedom, to free-

dom of expression and association, to have access to courts, to privacy, and to equal protection.

A second claim for relief was based on Article II, section 13 of the New Mexico Constitution prohibiting cruel and unusual punishment. It was also alleged in the second claim for relief that the conditions at the penitentiary violated plaintiffs' right to freedom of speech, religion, equal protection, due process, and other rights guaranteed by Article II, sections 11, 17, and 18 of the New Mexico Constitution.

In their third claim for relief, the plaintiffs alleged that the several defendants had failed to exercise their duties to operate the penitentiary in accord with Article II, section 4 of the New Mexico Constitution and N.M. Stat. Ann. §§ 42-1-38, 42-1-1.1, 42-1-31.2, 42-9-6(g), and 42-9-6(h).

The fourth claim for relief was based on provisions of the United States Law Enforcement Assistance Administration, 49 U.S.C. § 3750(b), with the plaintiffs claiming that they were third party beneficiaries under contractual arrangements between the Administration and the defendants.

Under the section heading "factual Allegations," the plaintiffs set forth in the first amended complaint the facts underlying all of their several claims for relief. Specifically, plaintiffs alleged that the penitentiary was "grossly and inhumanely overcrowded." According to the first amended complaint, some of the prisoners were forced to live in cells which were approximately 6' x 9' in size, with two or more persons being housed in one cell, and that the majority of the prisoners were housed in dormitories which were overcrowded, filthy and impossible to keep clean. Such overcrowding, plaintiffs alleged, destroyed any possibility of privacy and rendered the quarters unfit for human habitation because of mice, roaches, vermin, clogged toilets, and the like.

The plaintiffs also complained about food service, physical and sexual assaults by other prisoners, understaffed professional, educational and security personnel, improper classification of inmates according to their educational, vocational and health needs, lack of meaningful industrial or institutional employment, inadequate recreational activities, unduly restrictive visitation rights and correspondence policies, inadequate medical and dental care, lack of access to legal books and resources, and disciplinary proceedings that were devoid of due process.

Based upon the factual allegations, the plaintiffs sought class action certification, a declaratory judgment that the "totality of the conditions" at the penitentiary violated the rights of the plaintiffs established by the constitutions of the United States and of New Mexico and by both federal and local state statutes, and a preliminary and permanent injunction directing the defendants to comply with the various constitutional and statutory mandates. The plaintiffs also sought to require the defendants to pay the costs of the action, including attorneys' fees pursuant to 42 U.S.C. § 1988.

As above stated, the parties submitted several partial consent decrees to the district court in 1979, and orders were entered in accord with the matters agreed to by the parties. And on July 14, 1980, a final consent decree was entered by the court reflecting the agreements between the parties. These orders covered such items as correspondence policies and practices, attorney-prisoner visitations, food service, inmate legal access, visitation rights, classification of inmates, living conditions, inmate activity, medical care, mental health care, staffing and training of prison personnel, maximum security classification, and inmate discipline procedure.

A prefatory statement in the final consent decree stated that the agreement was voluntarily and mutually agreed upon as a compromise settlement of the dispute between

the parties. Another statement in the final agreement between the parties read as follows:

Those policy statements and the partial consent decrees on file herein may include specific requirements and procedures beyond what is required by the Constitution of the United States, the Constitution of the State of New Mexico, the federal Civil Rights Act, the New Mexico Torts Claim Act, or any other constitutional, statutory or common law requirement.

Article XI of the United States Constitution⁸ provides as follows:

The Judicial power of the United States shall not be construed to extend to any suit in law or in equity, commenced or prosecuted against one of the United States by Citizens of another state or by Citizens or Subjects of any Foreign State.

A literal reading of the eleventh amendment would appear to bar only suits against a state by a citizen of another state. However, it has been interpreted to also bar suits against a state brought by its own citizens. *Hans v. Louisiana*, 134 U.S. 1 (1890). In the instant case, the plaintiffs are citizens of New Mexico, and the State of New Mexico, as such, is not named as a defendant. The defendants are, however, various state officials, and the immunity granted in the eleventh amendment to the state bars a suit against a state official when the suit is one which, in essence, would operate against the state. *Edelman v. Jordan*, 415 U.S. 651 (1974). However the eleventh amendment does not bar a suit in federal district court against a state official seeking injunctive relief where the state official has allegedly violated federal

⁸ The eleventh amendment was adopted in response to *Chisholm v. Georgia*, 2 U.S. 4A (1793) which allowed a suit by two South Carolinians, on behalf of a British subject, against the State of Georgia.

law. *Ex Parte Young*, 209 U.S. 123 (1908). The Eleventh Amendment does, however, prohibit a federal district court from granting injunctive relief against a state official who has allegedly violated only state law, as opposed to federal law. *Pennhurst State School and Hospital v. Halderman*, 465 U.S. 89 (1984).

In the instant case, the plaintiffs instituted a suit against state officials alleging that they violated, *inter alia*, the federal constitution and federal statutes. Under *Ex Parte Young*, *supra*, the defendants under the eleventh amendment are not immune from such a suit. Counsel agrees that those parts of the consent decree setting forth rules and regulations for prison conduct which are directly related to federally protected rights, or tend to vindicate those rights, are proper, and are not here challenged. However, it is counsel's further position that those parts of the consent decrees which defendants seek to have vacated represent remedies that are *not* directly related to federally protected rights, nor do they tend to vindicate such rights. With the latter proposition, we disagree.

Arguably, the provisions which the defendants seek to vacate do relate to, or tend to vindicate, federally protected rights. In addition, the defendants, by the consent decrees, waived their right to make plaintiffs establish at trial that they were entitled to all the relief afforded them by the consent decrees. In this latter connection, the Supreme Court, in *Swift & Co. v. United States*, 276 U.S. 311, 329 (1928), commented as follows:

Here again, the defendants ignore the fact that by consenting to the entry of the decree, "without any findings of fact," they left to the Court the power to construe the pleadings, and in so doing, to find in them the existence of circumstances of danger which justified compelling the defendants to abandon all participation in these businesses, and to abstain from acquiring any interest hereafter.

The defendants' first request in their motion to vacate was that paragraph six in the 1980 consent decree be vacated, except for the first sentence thereof. *See* n. 3 *supra*. We regard paragraph six to concern procedure, rather than substance. It provides that no change which will lessen the benefits provided by the agreement and decree may be made, and then goes on to outline the procedure to be followed when the defendants proposed to "implement" the decree, namely, 30 days notice to plaintiffs prior to any implementation, granting plaintiffs 15 days to file any objection to a proposed change, requiring the parties to attempt to informally resolve any dispute, and providing for unresolved matters to be resolved by the district court after a hearing wherein the defendants have the burden of showing that the proposed change is just and will not lessen the benefits provided by the decree. These procedural safeguards for the plaintiffs, which the defendants in the consent decree saw fit to grant, attach to all the remedies provided in the decree, many of which defendants concede have a direct relationship to federal rights and which are not challenged in this case. Such being the case, the district court, in our view, did not err in refusing to vacate paragraph six, as requested by the defendants.

The other parts of the consent decree which the defendants seek to have vacated relate to classification of inmates, maximum security, inmate discipline, inmate activity, living conditions, and inmate visitation rights. As indicated, it was, and is, the plaintiffs' position that it was the "totality" of the prison conditions, not necessarily any one condition, which violated their federally protected rights. In our view, each of the matters which form the basis of this case is a part of that "totality" and does bear on, or tend to vindicate, federal rights. Further, by the 1980 agreement and the consent decree based thereon, the defendants waived their right to trial. Quite conceivably, if the case had gone to trial plaintiffs' evidence might well have established that the remedies

now complained about are indeed tied to federal rights, or at least tend to vindicate such rights.⁹ But the defendants voluntarily waived their right to insist that the plaintiffs prove their case in open court.

We reject the defendants' argument that the Eleventh Amendment dictates the granting of their motion to vacate. As indicated, counsel concedes that the district court had the jurisdiction and authority to grant relief to these plaintiffs against these defendants where prison conditions violated federal rights, be they constitutional or statutory. That concession wipes out much of the defendants' Eleventh Amendment argument.¹⁰ In *Local*

⁹ Such a "totality of the circumstances" approach was approved by the Supreme Court in *Hutto v. Finney*, 437 U.S. 678, 685-89 (1978).

¹⁰ Indeed, there is ample authority for finding that each of the contested sections vindicates a federal right. In *Ramos v. Lamm*, 639 F.2d 559 (10th Cir. 1980), *cert. denied*, 450 U.S. 1041 (1981), this court reaffirmed that there is a constitutional right to be reasonably protected from constant threats of violence and sexual assaults from other prisoners. More specifically, this court indicated that, although such a remedy was not warranted under the facts in *Ramos*, there may be a point where motility, classification, and idleness could constitute an actual violation of the eighth amendment. *Id.* at 566-67.

Similarly, the provisions regarding inmate visitation do not go beyond what could be ordered by a court. See *Pell v. Procunier*, 417 U.S. 817 (1974). Indeed, in 1984 the Department of Corrections' own analysis of the visitation provisions reached the conclusion that the decree did not go beyond those visitation rights that could be constitutionally imposed in its absence. Attachment A to Plaintiff's Supplemental Response to Defendant's Motion to Vacate or Modify the Judgment, filed 1/6/86.

All of the other contested provisions may be similarly justified. See *Rhodes v. Chapman*, 452 U.S. 337 (1981) (overcrowding may be a constitutional violation); *Ruiz v. Estelle*, 679 F.2d 1115 (5th Cir. 1952) (court may impose prophylactic rules to prevent repetition of constitutional violations).

However, it must be noted that the contested provisions should not be viewed in isolation, but rather as part of the "totality of

No. 93 v. City of Cleveland, 478 U.S. 501 (1986), the Supreme Court in a Title VII case, where a consent decree was entered, spoke as follows:

Accordingly, a consent decree must spring from and serve to resolve a dispute within the court's subject matter jurisdiction. Furthermore, consistent with this requirement, the consent decree must "com[e] within the general scope of the case made by the plaintiff . . . and must further the objectives of the law upon which the complaint was based. . . . However, in addition to the law which forms the basis for the claim, the parties' consent animates the legal force of a consent decree. . . ." Therefore, a federal court is not necessarily barred from entering a consent decree merely because the decree provides broader relief than the court could have awarded after trial (citations omitted).

As stated, central to defendants' argument is *Pennhurst State School and Hospital v. Halderman*, 465 U.S. 89 (1984). Such reliance is in our view misplaced. The Supreme Court in *Pennhurst* held that the Eleventh Amendment prohibited a federal district court from ordering state officials to conform their conduct to state law.¹¹ That is not our case. Here, the district court ordered state officials to conform their conduct to federal law, and the provisions of the decree which the defendants seek to vacate tend to vindicate those rights. And even if they didn't bear directly on federal rights, the provisions sought to be vacated come within the rule of *Local No. 93 v. City of Cleveland*, *supra*, i.e., (1) the consent decree springs from and serves to resolve a dispute within the

the circumstances" existing at PNM. *Hutto v. Finney*, 437 U.S. 678 (1978).

¹¹ In *Pennhurst*, judgment was entered after a "lengthy trial" and did not, as here, involve a consent decree.

district court's subject matter jurisdiction; (2) the consent decree comes within the "general scope" of the case made by plaintiffs in the first amended complaint; and (3) furthers the objectives upon which the complaint is based, in which event "the parties' consent animates the legal force of a consent decree" and a district court is not barred from entering a consent decree providing broader relief than the court might possibly have been empowered to enter after trial.

Kozlewski v. Coughlin, 871 F.2d 241 (2d Cir. 1989), resembles our case. In that case state officials appealed from a consent decree which established procedures and sanctions governing the suspension and termination of prison visitation rights, arguing that the sanctions, unlike the procedures, in the decree were unrelated to the underlying due process violation, and that accordingly the Eleventh Amendment barred subject matter jurisdiction. A divided panel of the Second Circuit rejected that argument and spoke as follows:

Before entering a consent judgment, the district court must be certain that the decree 1) "spring[s] from and serve[s] to resolve a dispute within the court's subject matter jurisdiction," 2) "come[s] within the general scope of the case made by the pleading," and 3) "further[s] the objectives of the law upon which the complaint was based. *Firefighters*, 478 U.S. at 525 (other citations omitted). These three conditions are sufficient even if the decree contains broader relief than the court could have awarded after trial.

Judgment affirmed.¹²

¹² The present appeal concerns only the propriety of the district court's order denying defendants' motion to vacate parts of the 1980 consent decree. We are not here concerned with defendants' right, if any, to have "equitable modification" of that decree.

APPENDIX B

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW MEXICO

Civil No. 77-0721-JB

DWIGHT DURAN, *et al.*,
Plaintiffs,

v.

GARREY CARRUTHERS, *et al.*,
Defendants.

MEMORANDUM OPINION AND ORDER

[Entered Feb. 11, 1988]

The defendants in the above-captioned civil action have filed a motion seeking to vacate portions of the consent decree approved and entered by this Court in 1980.¹ As stated in their brief in support of the motion to vacate, "[d]efendants' fundamental contention is that portions of the 1980 decree create rights that are not grounded in federal law and thus cannot be enforced by a federal court." Defendants' brief, p. 2. The defendants' motion relies on the eleventh amendment, and related considera-

¹ The entire consent decree was approved and entered on July 14, 1980. Certain portions of the decree, relating to correspondence, public and attorney visitation, food service, legal access, and visiting, were submitted to the Court in 1979, and were approved at various times during that year.

tion of comity. The motion has been extensively briefed by the parties, and has been given prolonged and careful attention by the Court. Ultimately, as demonstrated in this Memorandum Opinion, the motion rests on the incorrect and unsupported conception of the nature of the eleventh amendment immunity, and a misapplication of the principle of comity. Although this memorandum may seem prosaic and somewhat pedantic, for which the Court apologizes, it is necessary in order to meet the extravagant contentions of defendants.

I. PLAINTIFFS' FIRST AMENDED COMPLAINT.

On July 6, 1978, the plaintiff class, through counsel, filed its first amended complaint. The complaint alleges that "the totality of the overcrowding and other conditions at PNM fall beneath standards of human decency, inflict needless suffering on prisoners and create an environment which threatens prisoners' mental and physical well-being, and results in the physical and mental deterioration and debilitation of the persons confined therein which is both unnecessary and penologically unjustifiable." First Amended Complaint, ¶ 1.² This general allegation is elaborated upon by extensive factual allegations dealing with a wide range of conditions and practices alleged to be in place at the Penitentiary of New Mexico. First Amended Complaint, ¶¶ 15-32.

Following this elaboration, the first amended complaint sets forth four claims for relief: first, a claim that the

² At the time the first amended complaint was filed, the class definition was limited to all prisoners who are or will be confined in the Penitentiary of New Mexico, the only prison in the state other than those confined in minimum security facilities, who are not part of the class. The Court's July 14, 1980, order approving the comprehensive consent decree expanded the class, "by agreement of the parties . . . to include all those inmates who are now, or in the future may be, incarcerated in the Penitentiary of New Mexico at Santa Fe or at any maximum, close, or medium security facility open for operation by the State of New Mexico after June 12, 1980."

totality of the conditions, alleged in the complaint, violates the federal constitutional rights of the plaintiff class secured by the first, fourth, fifth, sixth, eighth, ninth and fourteenth amendments of the United States Constitution; the second and third claims for relief are based on state constitutional and statutory law;³ the fourth claim for relief is predicated on the assertion that the plaintiff class is a third-party beneficiary of a contractual arrangement between the defendants and the United States Law Enforcement Assistance Administration, pursuant to 49 U.S.C. § 3750.

II. THE 1980 CONSENT DECREE AND ORDER.

After extensive pretrial proceedings and negotiations, the parties presented to the Court a comprehensive settlement document entitled Agreement, to which was attached a series of documents labeled policy statements relating to various substantive areas of prison operations. This voluminous document contains mandatory and prohibitive injunctions, often of great specificity, relating to a broad range of conditions and practices at the Penitentiary of New Mexico.⁴

By an order dated July 14, 1980, the Court, finding that the agreement represented a compromised settlement of

³ The Court's jurisdiction over the state constitutional and statutory law claims was posited on principles of pendent jurisdiction.

⁴ The subjects of the consent decree are correspondence, public and attorney visitation, food service, legal access, visitation, classification, living conditions, inmate activity, medical care, mental health care, staffing and training maximum security and inmate discipline. Critically, each of these areas relates to one or more of the factual allegations set out in the first amended complaint, and incorporated into the first claim for relief, predicated on rights secured by the United States Constitution. First Amended Complaint, ¶¶ 15-32 (factual allegations) and ¶¶ 33-34 (First Claim for Relief). The precise correlation of the portions of the consent decree and the paragraphs of the first amended complaint is analyzed in n.21, below.

the disputes between the parties, provisionally approved the comprehensive consent judgment. The July 14 order, which itself was entered by consent, includes standard prefatory language by which the Court acknowledged that the defendants disavowed liability and that the parties agreed to limit the admissibility of the document.

Paragraph 2 of the July 14 order states that the consent decree "may include specific requirements and procedures beyond what is required by the Constitution of the United States." The order provides further for redefinition of the plaintiff class "to include all those inmates who are now, or in the future may be, incarcerated in the Penitentiary of New Mexico at Santa Fe or at any maximum, close or medium security facility opened for operation by the state of New Mexico after June 12, 1980."

Finally, the July 14 order directed that notice of the order and settlement be provided to all members of the class, pursuant to Rule 23 of the Federal Rules of Civil Procedure. The July 14 order stated that the Court had examined the agreement and found that it represented a compromise settlement of the disputes of the parties. Following that review, under Rule 23, the Court gave tentative approval of the decree, stating that its approval was "provisional until fifteen (15) days after said notice." The order was to "become final if not rejected [by the Court] or modified by agreement of the parties based upon said objections [from the plaintiff class] within thirty (30) days."

Pursuant to that provision, the objection process commenced. Two objections from the plaintiff class were submitted to the Clerk, as mandated by the class notice, but neither objection was sufficient to provoke the Court's rejection of the consent judgment. In the absence of a motion from the parties to modify the judgment, the July 14 order, approving the consent decree and adopting it as an order of the Court, became final.

III. PROCEEDINGS SINCE ENTRY OF THE CONSENT DECREE.

The litigation did not terminate with entry of the consent judgment and order. Since 1980, extensive activity has taken place within the litigation, including recurrent allegations by the plaintiff class of contumacious conduct on the part of the defendants. In 1983, with the agreement of the parties, the Court appointed a special master and a deputy special master, pursuant to Rule 53, Fed. R. Civ. P., to monitor the state of the defendants' compliance with all remedial orders entered in this cause. Order of Reference, June 3, 1983. Since that time, the special master has filed twenty reports on defendants' state of compliance, totaling more than 2,000 pages setting forth findings of fact as to the state of defendants' compliance, as well as a volume of over 700 separate findings of fact relating to the state of defendants' compliance as of early 1986. Those reports have provided a factual basis for the entry of numerous orders by the Court approving the special master's findings. Additionally, the parties have entered into several stipulations provoked by the findings of the special master and the orders of the Court.

Because of the fundamental jurisdictional claim raised in defendants' motion to vacate, this history is not relevant to the Court's consideration of that motion. It serves to show, however, that it has provided the Court with a vast factual record in this case which has informed the Court's evaluation of the consent decree in determining the federal constitutional rights of the plaintiff class and the scope of equitable relief required to redress deprivation of those rights.

IV. DEFENDANTS' MOTION TO VACATE.

A. *Prior Motions*

On June 12, 1987, the defendants filed their motion to vacate portions of the 1980 decree. At the time this

motion was filed, defendants' motion to modify the decree, and plaintiffs' motion seeking a finding of contempt against defendants, both of which were filed in December 1985, were pending before the Court. For the purpose of those pending motions, the Court had compiled, through the efforts of the special master, an extensive factual record describing defendants' state of compliance, as of 1986, with the outstanding remedial orders.⁵ Additionally, in December 1986, the Court heard extensive testimony relating to the parties' December 1985 motions.

While the 1985 motions were pending decision, defendants filed, on February 6, 1987, a motion seeking to modify a single provision of the consent decree requiring single-celling at all institutions subject to the orders in this case. Then, while it was pending, defendants gave notice of their intent to withdraw, without prejudice, the February 6, 1987, motion to modify. Withdrawal of that motion was granted in the Court's order of June 4, 1987. The defendants, by letter to the Court, suggested that the Court withhold ruling on the pending motions to modify the remedial decree until the defendants could file a different, broader motion. Presumably, the instant motion to vacate, filed June 12, is that motion.

B. *The June 12, 1987 Motion to Vacate*

The defendants' motion to vacate seeks to modify the 1980 decree by eliminating from it all provisions that, in the view of the defendants, are not based on federal law, or which cannot be construed plausibly as remedial measures designed to correct federal constitutional violations. The defendants contend that the eleventh amendment to the United States Constitution and derivative considera-

⁵ The process by which that record was described is set out in the Court's order of January 10, 1986.

tions of comity require elimination from the decree of any provisions that do not enforce federal rights.

The defendants essentially contend that "portions of the 1980 consent decree create rights that are not grounded in federal law and thus cannot be enforced by a federal court." This argument has two essential threads: *first*, that federal courts do not have authority to enter orders against states, or against state officials acting in their official capacity, except to vindicate federal rights; and *second*, that in entering orders designed to vindicate federal rights, federal courts are constrained to limit those orders to measures required to protect those federal rights. The first is based on the principle of sovereign immunity embodied in the eleventh amendment to the United States Constitution. The second is based on judicially created considerations of federalism and comity which, in defendants' view, are implicit in, or at least derivative from, the eleventh amendment principle.

Defendants' motion to vacate ultimately raises questions regarding the nature of the eleventh amendment immunity afforded to states and state officials and the relationship of that immunity to causes of action and remedial relief. Additionally, defendants' motion asserts that the judicially created doctrine of comity is rooted in the eleventh amendment and embodies constraints on the exercise of jurisdiction over causes of action.

Full and fair assessment of these complex, detailed arguments requires a careful analysis of the eleventh amendment, sovereign immunity, the nature of federal constitutional rights, the jurisdiction of federal courts over causes of action based on state rights, the nature of comity as a restraint on jurisdiction and/or relief, and the effect of these considerations when the Court enters a judgment by consent rather than a judgment following an adversary adjudication.

V. THE ELEVENTH AMENDMENT, SOVEREIGN IMMUNITY AND FEDERAL JURISDICTION.

A. *The Eleventh Amendment, Sovereign Immunity—Federal Rights*

The eleventh amendment to the United States Constitution provides:

The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of Another State, or by Citizens or Subjects of any Foreign State.

Although its language is to the contrary, the amendment has been construed to prohibit suits against a state brought by its own citizens as well as those brought by citizens of another state. *Hans v. Louisiana*, 134 U.S. 1 (1890).⁶ It is established, then, that the eleventh amendment shields the states from suit even when state actions are alleged to be in violation of the United States Constitution.

⁶ There is considerable disharmony among the current members of the United States Supreme Court as to the validity of the holding in *Hans*. Justices Brennan, Marshall, Blackmun and Stevens have expressed their opinion that *Hans v. Louisiana*, and the derivative holding in *Edelman v. Jordan*, 415 U.S. 651 (1974), "cannot be reconciled with the federal system envisioned by [the Constitution]." *Atascadero State Hosp. v. Scanlon*, 473 U.S. 234, 303 (1985) (Justice Blackmun, joined by Justices Marshall, Brennan and Stevens, dissenting).

Justice Scalia has expressed his view that "the correctness of *Hans* as an original matter, and the feasibility, if it was wrong, of correcting it without distorting what we have done in tacit reliance upon it, [are] complex enough questions that I am unwilling to address them in a case whose presentation focused on other matters." *Welch v. Texas Dep't of Highways & Pub. Transp.*, 483 U.S. —, 97 L. Ed. 2d 389, 411 (1987) (Justice Scalia concurring in part and concurring in the judgment).

Notwithstanding the possible infirmity of *Hans*, its holding must be, and is, fully accepted for purposes of the present discussion.

That doctrine, by its terms, undermines the supremacy of federal law and is therefore in derogation of the supremacy clause of the United States Constitution. Art. VI, § 2. The Supreme Court avoided this unacceptable result by its essential ruling in *Ex Parte Young*, 209 U.S. 123 (1908). In *Young*, the Court held that the eleventh amendment does not bar an action against a state official alleging that the official's conduct violated the United States Constitution. In order to redeem the holding in *Young*, and thereby secure the supremacy of federal law, the Supreme Court developed a now-famous analytical form: when the official actions of a state official come into conflict with the superior authority of the United States Constitution, the officer "is in that case stripped of his official or representative character and is subjected in his person to the consequences of his individual conduct. The state has no power to impart to him any immunity from responsibility to the supreme authority of the United States." *Ex parte Young, supra* at 159-60.⁷

The legal precept of *Ex Parte Young* is this: a state inherently lacks the authority to authorize one of its officers to act in a manner that violates the United States Constitution. Therefore, any officer acting in violation of the United States Constitution is acting *ultra vires*. In so acting, the state official forfeits his representative character, and loses the sovereign immunity that, under the eleventh amendment, shields official state action from challenge in federal court. In other words, *Ex Parte Young* approves equitable actions against state officials in their individual capacities for violations of constitu-

⁷ The obvious paradox of this construct—that such actions by state officials are "state action" for purposes of the fourteenth amendment but not for purposes of the eleventh amendment—has been recognized by the Court, but has not undermined the vitality of the principle. See *Florida Dep't of State v. Treasurer Salvors, Inc.*, 458 U.S. 670, 685 (1982).

tional rights, the eleventh amendment notwithstanding. Thus, *Ex Parte Young* enables plaintiffs to allege "state action" sufficient to trigger the fourteenth amendment without automatically raising the bar of the eleventh amendment.⁸

It is not always easy to determine when an action in federal court is against the state, and therefore barred by the eleventh amendment, and when it is against state officials acting in contravention of federal rights and therefore outside the shield of the eleventh amendment. But, the Court need not explore the nuances of that inquiry for purposes of addressing the present issue. It is sufficient to observe that equitable actions against state officials, seeking prospective injunctive relief to correct federal constitutional deprivations, are permissible.⁹

*B. The Eleventh Amendment and Sovereign Immunity—
State Rights in Federal Court.*

The rationale that supports *Ex Parte Young*—vindication of the supremacy of federal rights—does not apply to actions in federal court in which plaintiffs seek vindication of rights based on state law. *Pennhurst State School & Hospital v. Halderman*, 465 U.S. 89 (1984), presented the question of "whether a federal court may award injunctive relief against state officials on the basis

⁸ This principle is further elucidated in *Home Telephone & Telegraph Co. v. City of Los Angeles*, 227 U.S. 278 (1913) which establishes the fourteenth amendment as a substantive rule of conduct binding on state officials individually regardless of whether or not the state has officially sanctioned their actions.

⁹ Actions of this kind are not barred by the eleventh amendment even if they will have a significant effect on the state treasury. *Edelman v. Jordan*, *supra* at 660-73. "Such an ancillary effect on otherwise sovereign affairs of the state is a permissible and often inevitable consequence of the principle announced in *Ex Parte Young*." *Id.* at 668.

of state law.” 465 U.S. at 91.¹⁰ The Court answered the question in the negative, noting that

[i]n such a case the entire basis for the doctrine of *Young* and *Edelman* disappears. A federal court’s grant of relief against state officials on the basis of state law, whether prospective or retroactive, does not vindicate the supreme authority of federal law. We conclude that *Young* and *Edelman* are inapplicable in a suit against state officials on the basis of state law.

465 U.S. at 106.

The holding in *Pennhurst* is simply stated: the eleventh amendment prohibits a federal court from awarding injunctive relief against state officials on the basis of state law.¹¹

¹⁰ The state law claims in *Pennhurst* were pendant to federal constitutional and statutory claims. After holding that the eleventh amendment prohibits injunctive relief against state officials based on state law, the Court in *Pennhurst* assessed the effect of the principle on federal court pendant jurisdiction. The Court held that pendant jurisdiction does not overcome the bar of the eleventh amendment, noting that “a claim that state officials violated state law in carrying out their official responsibilities is a claim against the state that is protected by the Eleventh Amendment. We now hold that this principle applies as well to state law claims brought into federal court under pendant jurisdiction.” 465 U.S. at 121.

¹¹ Defendants extrapolate from *Pennhurst* three significant principles:

1. An extension of federal judicial power cannot be predicated on violation of state law. (This formulation is, of course, overly broad. The holding in *Pennhurst* is that the eleventh amendment proscribes the exercise of federal judicial power against states on the basis of a state’s own law. There is nothing in *Pennhurst* to suggest that other forms of pendant jurisdiction are unconstitutional.)
2. There is a specific constitutional basis for the comity principle, with attendant limitations on the situations in which a consent decree can be treated as a waiver by a state of its

VI. THE SCOPE OF REMEDIAL POWER— COMITY AND EQUITABLE DISCRETION.

The preceding section discussed limitations arising from the eleventh amendment on the power of federal courts to assume jurisdiction over suits involving causes of action based on (a) federal or (b) state law. The constitutional constraints operate at the most fundamental level to deprive federal courts of authority, *ab initio*, to take cognizance of legal claims. Apart from these doctrines, other considerations, arguably implicit in the constitutional scheme but ultimately creations of wise judicial policy, restrain federal judicial action in the determination of remedies. These principles operate after the threshold question of federal jurisdiction has been answered in the affirmative and a deprivation of federal rights has been found to exist. The most common term for this principle of restraint is comity.

One is hard-pressed to define comity, although the concept pervades contemporary jurisprudence, particularly in the area of institutional reform litigation. The essence of comity is restraint, both in adjudicating matters and in imposing remedies. First, comity requires that federal courts be reluctant to scrutinize the operations of state institutions in search of federal constitutional infirmities. Second, faced with proof of a violation of federal rights, federal courts should intervene only to the extent required to vindicate those rights. In doing so, federal courts should not "impose upon [governmental agencies]

immunity from excessive federal decrees. (This is an unsupported conclusion; the error, which is at the heart of defendants' argument, is discussed at length in Section VIII, below.)

3. The eleventh amendment creates a jurisdictional limitation on federal judicial power, thereby rendering decrees entered in violation of that limitation void. (This principle as stated is correct, but is inapplicable to the present case for reasons discussed at length in this memorandum.)

See Defendant's brief, p. 12.

their views of what constitutes wise economic or social policy.” *Dandridge v. Williams*, 397 U.S. 471, 486 (1971).¹²

These considerations of restraint in no way vitiate the fundamental constitutional tenet that federal courts are empowered to vindicate federal rights, notwithstanding sovereign immunity or judicial restraint. Defendants’ ignore the distinction in the comity principle between restraint in adjudicating claims and restraint in formulating remedies, a critical distinction explicitly acknowledged in the authorities relied upon by the defendants. For example, in their brief, the defendants cite *Smith v. Sullivan*, 611 F.2d 1039, 1045 (5th Cir. 1980), for the proposition that “courts . . . may not become enmeshed in the minutiae of prison operations” (internal citations omitted). In *Smith*, however, the quoted passage is immediately preceded by the obvious qualification, “unless acting to remedy federal constitutional violations as part of a totality approach.” *Id.*

Defendants also rely on *Battle v. Anderson*, 708 F.2d 1523 (10th Cir. 1983), *cert. dismissed*, *Meachum v. Battle*, 465 U.S. 1014 (1984), as authority for the related but separate strands of their comity argument—separation of powers and pragmatic restraint. *See De-*

¹² Defendants correctly point out that the “principle of restraint is derived from several interrelated concerns.” Defendants’ brief p. 4. First, the principle of separation of powers cautions against the usurpation, by the judiciary, of functions properly charged to the legislative and executive branches of the government. *Bell v. Wolfish*, 441 U.S. 520, 548 (1979); *Procunier v. Martinez*, 416 U.S. 396, 404-05 (1974). Apart from this general principle, practical restraints dictate that the judiciary should be loath to assume the task of restructuring the operations of state government. Particularly where the daily operation of a corrections facility is in question, the judiciary should not lightly assume responsibility for making the day-to-day decisions that require a closer familiarity with the institution than is possessed by the court. *See generally* *Bell v. Wolfish*, *supra* at 547; *Procunier v. Martinez*, *supra* at 405.

fendants' brief, p. 6.¹³ In *Battle*, however, the Court of Appeals for the Tenth Circuit analyzed comity principles precisely as the Court does here. Recognizing the "reluctance of federal courts to intervene in matters of prison administration," the court of appeals nonetheless approved the district court's conclusion that the principle of comity "was not a justifiable basis for failure to take cognizance of valid federal constitutional claims relating to rights secured to inmates by the federal Constitution and the laws of the United States." 564 F.2d at 392, citing *Procunier v. Martinez*, *supra* at 817, *Cruz v. Beto*, 405 U.S. 319 (1972), and *Johnson v. Avery*, 393 U.S. 483 (1969).

Defendants also rely on a subsequent opinion in *Battle v. Anderson*, 708 F.2d at 1523, and quote from that opinion an article from the *Harvard Law Review* by Professor Owen Fiss. Again, the matter is taken out of context, and ignores the holding of the court. In fact, the 1983 *Battle* opinion sets out simply and explicitly a doctrine of equitable judicial power that serves to counterbalance, and ultimately overcome, whatever limitations might be generated by the principle of comity. The court observes that "the court, in exercising continuing jurisdiction to achieve structural reform, cannot terminate its jurisdiction until it has eliminated the constitutional violation 'root and branch'." 708 F.2d at 1538, citing *Green v. County School Board*, 391 U.S. 430, 438 (1968). Thus, the Court of Appeals for the Tenth

¹³ Throughout their brief, defendants entwine the concept of comity with that of separation of powers. For example, defendants quote the Supreme Court's opinion in *Bell v. Wolfish*, noting that intrusive judicial decrees usurp the role preserved under our constitutional system for the "legislative and executive branches of our government, not the judicial." 441 U.S. at 548. Separation of powers arguments have no role, however, where properly named defendants are charged with violations of federal rights and are held accountable for those violations by injunctions that mandate specific measures designed to reinstate and protect constitutional rights.

Circuit has directly applied to institutional reform litigation the vital principle that a federal court's equitable powers are inherently sufficiently broad to allow federal courts to fashion effective injunctive relief to cure federal constitutional violations. The nature of the remedy for deprivation of federal constitutional rights is determined by the nature and scope of the constitutional violation. *Swann v. Charlotte Mecklenberg Board of Education*, 402 U.S. 1, 16 (1971). Once a constitutional violation is established, remedial decrees may require actions not independently required by the Constitution if those actions are, in the judgment of the court, necessary to correct the constitutional deficiencies. *Green v. County School Board*, *supra*; *Milliken v. Bradley*, 433 U.S. 267 (1977) (*Milliken II*); *Gilmore v. City of Montgomery*, 417 U.S. 556 (1974).¹⁴

The principles of equitable breadth and flexibility are at some tension with the doctrine of comity. This tension, however, is superficial; ultimately the doctrines are consistent. The preservation of the supremacy of federal law that animated *Ex Parte Young* serves as well to reconcile the facial inconsistency of these doctrines. First, *Ex Parte Young* makes clear that federal courts are authorized to vindicate federal rights, the principle of sovereign immunity notwithstanding. Second, where fed-

¹⁴ It is worth noting that the holding in *Milliken II* followed the Supreme Court's holding in *Milliken v. Bradley* (*Milliken I*), 418 U.S. 717 (1974), where the Court noted that the Court's equitable remedy must be related to "the condition that offends the Constitution." 418 U.S. at 738. *Milliken I* and *Milliken II* therefore establish the fundamental principle that a remedial decree entered to correct constitutional violations must be designed as nearly as possible to correct the constitutional violation *and* to restore the victims of unconstitutional conduct to the position they would have occupied in the absence of such conduct. This formulation is merely a more elaborate restatement of the principle embraced by the court of appeals in *Battle v. Anderson* that constitutional violations must be eliminated "root and branch." 708 F.2d at 1538.

eral constitutional rights have been traduced, principles of restraint, including comity, separation of powers and pragmatic caution, dissolve; federal courts are empowered and required to design equitable remedies that are effective to cure constitutional violations. In this tailoring of remedies, of course, the preferred course is to preserve as much discretion for state administrators as possible. Yet, where constitutional rights have been violated, comity does not require, or even permit, a federal court to countenance those violations. It thus is clear that in entering remedial decrees, such decrees should be (a) designed to be effective, (b) tailored to the constitutional violations, and (c) fashioned to restore victims to their positions before the constitutional violations. See n. 14, above. In guaranteeing that federal injunctions will be effective within these parameters, however, federal courts should be mindful of state sovereignty and should intrude as little as necessary on state prerogatives.

Thus, it is apparent that, whatever restraints are imposed by comity considerations, these limitations are not jurisdictional. Since there is no jurisdictional bar to a court's evaluating claims of federal constitutional violation, even in a setting as delicate as that involving the operations of a state institution, the consequent limitations on a court's assessment of a consent decree presented to the court by the parties, are *not* jurisdictional. Indeed, when a remedy has been fashioned with the participation and consent of the state, and that remedy is presented to the court, the role of judicial restraint is problematic. In such a situation, it is the prison administrators themselves who are proposing the remedy. Absent a limitation on assuming jurisdiction over the proposed remedy, the court must make two inquiries: first, is the remedy sufficient to protect the interests of the plaintiff class? (This inquiry is mandated by Rule 23 of the Federal Rules of Civil Procedure.) Second, is the relief illegal? *Local No. 93 (Firefighters) v. City of*

Cleveland, 478 U.S. —, 92 L. Ed. 2d 405 (1986) (a federal court may enter a consent decree that provides relief greater than the court might have awarded after trial, unless the relief is illegal).

VII. PRELIMINARY CONCLUSIONS OF LAW.

Before undertaking a discussion of the weaknesses in defendants' jurisdictional argument, certain fundamental principles, derived from the foregoing discussion, should be set out.

1. The eleventh amendment bars a suit of any kind against a state in its own name. *Hans v. Louisiana*, *supra*.

2. The eleventh amendment bars a suit against a state official when the suit, in essence, is one that would operate against the state. *Edelman v. Jordan*, *supra*.

3. The eleventh amendment bars a suit against the state official seeking injunctive relief based on state law. *Pennhurst State School & Hospital v. Halderman*, *supra*.

4. The eleventh amendment does not bar a suit against a state official seeking injunctive relief, alleging that the state official has violated federal law and seeking only prospective relief. *Ex Parte Young*, *supra*.

5. In fashioning a remedy for constitutional violations, the court should tailor its remedy to constitutional violations, yet insure that the remedy effectively cures the constitutional violations and restores the victims to their positions before the constitutional violation. *Swann v. Charlotte Mecklenberg*, *supra*; *Green v. County School Board*, *supra*; *Battle v. Anderson*, *supra*.

VIII. DISCUSSION.

Defendants' argument rests on a fundamental confusion and misapplication of two principles: the jurisdictional limitations derived from the eleventh amendment,

and the equitable considerations derived from the principle of comity.

Plaintiffs' first amended complaint, as observed previously, set forth extensive factual allegations, relating to virtually every facet of the operation of the Penitentiary of New Mexico. Plaintiffs' first claim for relief alleged that, on whole, the factual conditions at the Penitentiary of New Mexico deprived the plaintiff class of rights secured by the United States Constitution. As a threshold matter, then, federal jurisdiction over the civil action existed by virtue of 28 U.S.C. §§ 1331 and 1343(3).

As a matter of fundamental due process, the defendants had the right to challenge the factual allegations set out in the complaint and thereby put the plaintiffs to their proof. Through the adjudicative process, defendants had the right to challenge the conclusion of law that the conditions alleged and proved by the plaintiffs, viewed in their totality, violated the constitutional rights of the plaintiff class. By agreeing to the entry of a consent judgment, however, the defendants waived their right to trial on the factual allegations and adjudication of the legal conclusion. *See generally Swift & Co. v. United States*, 276 U.S. 311, 316 (1928); *Local No. 93 (Firefighters) v. City of Cleveland*, *supra*.

Following the waiver of the right to proof of violation, the next step in the process of adjudication became the fashioning of appropriate remedies. The parties presented to the Court an agreed remedial order. In doing so, the defendants waived their rights to the restraints of comity in the selection of equitable remedies.¹⁵ Indeed, judicial application of such restraints in the face of a remedy proposed by the defendants would be anomalous.

¹⁵ This is not to suggest that the defendants waived eleventh amendment limitations. As set out in this order, because of the federal basis for the plaintiffs' claims for relief, those limitations were not at issue in this action.

Faced with a proposed consent decree, setting out relief that is the product of agreement of the parties, the Court is under an obligation to address only three issues:

First, is the complaint, which serves as the sole judicial cognizable basis for jurisdiction, sufficient to invoke federal jurisdiction? That inquiry is easily satisfied, as set out above.

Second, is the relief illegal? Nothing in the consent decree requires action, or refraining from action, on the part of state officials in a manner that would violate the law. Thus, the consent decree does not violate the principle established by the United States Supreme Court in *Local No. 93 v. City of Cleveland*, *supra*.

Third, is the relief adequate to protect the interest of the plaintiff class? As discussed in section II, above, this inquiry, governed by Rule 23, Fed. R. Civ. P., was conducted and the Court's conclusion is supported. Thus, the Court, in exercising power over a civil action that properly invoked federal jurisdiction, approved a remedial order the content of which was the product of free, unhindered, plenary negotiations between the parties.

The defendants' motion to vacate portions of the order is based on the assertion that, notwithstanding the existence of a complaint properly invoking federal jurisdiction and the proper entry of a lawful consent decree, any portions of the consent judgment that are not grounded in federal law, or that cannot plausibly be viewed as remedies for federal violations, are void as a matter of jurisdiction. This legal position involves two distinct errors.¹⁶

¹⁶ Another fundamental error—the discussion of waiver—is also at the heart of defendants' position. Because this issue is irrelevant, it will not be treated in the text. The discussion of waiver in defendants' brief contends that any waiver of the state's sovereign immunity was unauthorized as a matter of law, and therefore is ineffective, at least as a constraint on the conduct of successor

Defendants construe *Pennhurst* as holding that "the Eleventh Amendment deprives a federal court of the power to award any relief, injunctive or otherwise, against state officials sued in their official capacity, except where that relief is premised on federal law." Defendants' brief, p. 11. This construction of *Pennhurst* is entirely accurate. Defendants' argument from *Pennhurst*, however, transmutes the pronounced principle into a limitation on remedy. This distortion is a fundamental error which undermines defendants' argument. Careful analysis of *Pennhurst* demonstrates that the eleventh amendment immunity identified and applied in that case is a product of the cause of action alleged by the *Pennhurst* plaintiffs and relied upon by the Court as a predicate for relief. This critical fact, which is ignored by defendants, is demonstrated unequivocally at several places in the opinion. The Court stated the question before it to be "whether the claim that petitioners violated *state law* in carrying out their official duties at *Pennhurst* is one against the state and therefore barred by the Eleventh Amendment." 465 U.S. at 103 (emphasis in original). The *Pennhurst* Court concluded "that *Young* and *Edelman* are inapplicable in a suit against state officials on the basis of state law." *Id.* at 106. Finally, the Court described its holding to be that "federal courts lack jurisdiction to enjoin state institutions and state officials on the basis of this state law." *Id.* at 124-25. The clear implication of *Pennhurst*, however, is

officials. As demonstrated in the text, the state defendants named in the first amended complaint were not protected from the allegations of that complaint by virtue of sovereign immunity. The complaint alleges federal constitutional violations and seeks injunctive relief to correct those violations. In the face of such allegations, and a federal cause of action structured in the manner of the first amended complaint, state officials, properly named, do not enjoy sovereign immunity. Accordingly, the question of waiver of sovereign immunity did not arise in this proceeding. Rather, the relevant waivers were of proof of constitutional violation and of comity-based constraints in the form of equitable relief.

that entry of relief would be appropriate if necessary to vindicate the supremacy of federal law.

Defendants also ignore the connection of the holding in *Pennhurst* to the cause of action upon which the district court predicated its award of injunctive relief. Moreover, their characterization of *Pennhurst* as a limitation on the scope of relief in the face of federal violation is unsupported. Indeed, since *Pennhurst* involved no proof of federal violation, any interpretation of *Pennhurst* as a limitation on relief for violations of federal law is unwarranted.

The mischaracterization of *Pennhurst* is most clearly revealed on page 12 of defendants' brief, where they assert that "*Pennhurst* recognized a specific constitutional basis for the comity principle, with attendant limitations on the situations in which a consent decree can be treated as a waiver by the state of its immunity from excessive federal decrees." This assertion is puzzling, for at least two reasons. First, the Supreme Court specifically announced that it did not need to reach the issue of comity, because it found "the Eleventh Amendment challenge dispositive." 465 U.S. at 97. Second, *Pennhurst* had nothing to do with a consent decree, and contains no statement whatever as to the limitation on remedies agreed to by consent. This critical component of defendants' argument from *Pennhurst* is, in fact, unsupported by that case.

Lelsz v. Kavanagh, 807 F.2d 1243, reh'g denied, 815 F.2d 1034 (5th Cir. 1987), similarly does not support defendants' argument. In *Lelsz*, the court of appeals reviewed an order entered to enforce provisions of a consent decree that had been entered two years earlier. The underlying action raised federal constitutional and state law claims relating to treatment of the plaintiff class which was comprised of mentally retarded patients housed in state schools. The consent decree approved by

the court consisted of numerous provisions relating to treatment of the mentally retarded. Slightly more than one and one-half years after entry of the consent decree, the plaintiffs filed a motion for community placement, alleging that the transfer of members of the plaintiff class to community facilities was necessary to achieve compliance with the consent decree. Following a hearing on the motion, the court entered an order directing transfer to community centers. That order was appealed and is the subject of the opinion in *Lelsz*.

The court of appeals vacated the enforcement order. The court noted first that the order approving the underlying consent decree "painstakingly illicit[s] the constitutional or statutory basis for relief afforded in every significant paragraph of the [consent decree]. That order readily demonstrates that any rights the class members may have with regard to community placement were understood by the district court to originate in, and do in fact exist in, state law." 807 F.2d at 1247.¹⁷ This conclusion required the court of appeals, pursuant to *Pennhurst*, to conclude that the relief granted was grounded solely on state law.¹⁸

¹⁷ The court concluded on the basis of a clear record, that the relief in the consent decree was predicated *solely* on state law. This conclusion left the question for the *Lelsz* court as to "whether the district court may enforce the consent decree beyond the guarantees contained in the federal Constitution and laws simply because it is a consent decree." The court held ultimately that such enforcement violated the eleventh amendment. That question is inartfully formed, however, since the precise question was whether a district court can enforce a consent decree based solely on state law. The *Lelsz* court held that such enforcement violated *Pennhurst*. To the extent the *Lelsz* court answered a broader question, that answer is dicta. See discussion of *Ibarra v. Texas Employment Comm'n*, below.

¹⁸ This conclusion was strongly attacked by Judge Reavley in an opinion dissenting from the denial of a petition for rehearing *en banc*. See 815 F.2d at 1035-37. Seven of the fourteen judges voting

Lelsz has been interpreted in *Ibarra v. Texas Employment Commission*, 823 F.2d 873 (5th Cir. 1987). *Ibarra* construed *Lelsz* as applying *Pennhurst* to vacate a portion of the district court order enforcing the consent decree when the relief provided by that part of the decree was grounded solely on state law. 823 F.2d at 877, citing *Lelsz*, 815 F.2d at 1034. The *Ibarra* court held:

Assuming without deciding that *Pennhurst* would extend to a federal court order approving a consent decree, we conclude that *Pennhurst* does not apply to the present case because the consent decree is not based on state law. . . . The concerns about state sovereignty and the lack of any federal interests that were critical to *Pennhurst* are not appropriate when, as in this case, the issue is one of interpreting federal law.

Thus, any implication that the *Lelsz* holding went beyond an application of *Pennhurst* to a consent decree based solely on state law is eliminated dispositively by *Ibarra*.¹⁹

Lelsz, as clarified in *Ibarra*, then, reads *Pennhurst* to hold that a federal court does not, under *Pennhurst*, have jurisdiction to approve a consent decree predicated solely on state law violations since to do so would offend the eleventh amendment.²⁰ This doctrine has no bearing,

dissented from the denial of the motion for rehearing. Of particular note is the following portion of Judge Reavley's dissent:

In a contested case, in which a pendent state-law claim is asserted, *Pennhurst*, requires the federal court to look at the source of the claim, but where the parties have not separated their claims and remedies and agree on remedies for both, *Pennhurst* itself places no jurisdictional limitation upon the federal court in enforcing the agreement

Lelsz, 815 F.2d at 1036.

¹⁹ Cf. *Welsch v. Gardebring*, 667 F. Supp. 1284, 1289 (D. Minn. 1987), which is discussed below in note 22.

²⁰ Again, Judge Reavley's distinction between a pure state law claim, and mixed claims, is critical but ignored in *Lelsz*.

however, on the present case. Here, the plaintiffs' first amended complaint alleged violations of federal law. In response to that complaint, the parties agreed to entry of comprehensive relief. It is literally true that every substantive section of the consent decree is tied to factual allegations in the first amended complaint, which form the factual predicate for plaintiffs' claim that the totality of conditions at the Penitentiary of New Mexico offends the United States Constitution.²¹

The foregoing discussion produces two clear conclusions, each of which mandates rejection of each separate strand of defendants' argument.

First, because the complaint named state officials in their official capacity as defendants in a suit seeking purely injunctive relief for federal constitutional violations, the eleventh amendment did not afford defendants sovereign immunity. Accordingly, the Court had, and has, jurisdiction over the civil action. See *Welsch v. Gardebring*, 667 F. Supp. at 1288-89.²²

²¹ The following chart demonstrates the relationship between paragraphs in the first amended complaint and portions of the consent decree.

Correspondence—	¶ 28
Public/Attorney Visitation—	¶ 27
Food Service—	¶ 21
Legal Access—	¶¶ 30, 31
Visitation—	¶ 27
Classification—	¶ 24
Living Conditions—	¶¶ 16, 17, 18, 19, 20
Inmate Activity—	¶¶ 19, 24, 25, 26
Medical Care—	¶ 29
Mental Health Care—	¶ 29
Staffing and Staff Training—	¶¶ 22, 23
Maximum Security—	¶ 23
Inmate Discipline—	¶ 32

²² In *Welsch v. Gardebring*, the defendants, in challenging the court's jurisdiction to approve a consent decree, made essentially the same argument which is presented here in defendants' motion. The district court's rejection of that argument is predicated on

Second, because each element of the relief afforded in the consent decree is tied to a factual allegation in the complaint asserting federal constitutional violations based on the totality of the circumstances, the Court had jurisdiction to enter the consent decree.²³ Thus, defendants' argument that the consent decree approved by the Court in this case is void because it abrogates the state's eleventh amendment immunity, is unavailing.

analysis of *Pennhurst, Ex Parte Young*, and *Local No. 93 v. City of Cleveland*, as is done in this opinion.

²³ Defendants' reliance on *Washington v. Penwell*, 700 F.2d 570 (9th Cir. 1983), is also misplaced. In *Penwell*, the defendants sought to vacate a provision of the consent decree that required the state to fund a prisoners' legal services organization at a defined level. That provision had been entered by consent in response to a claim that indigent Oregon prisoners were provided with inadequate legal facilities. The court of appeals affirmed the district court's decision vacating the challenged portion. In doing so, the court noted that the provision on its face ran against the State of Oregon and did not limit the decree to the defendants' best efforts to obtain state funding. 700 F.2d at 574. As such, the provision ran afoul of the eleventh amendment. It has long been established that a court order running directly against the state treasury violates the eleventh amendment. See, e.g., *Edelman v. Jordan*, *supra*.

Certain language in *Penwell* suggests that the funding provision is unenforceable not only because it runs directly against the state but also because it is more than is required to alleviate violations of federal law. This language, however, must be viewed in context of the full discussion of the case, which notes that "if general legal services for prisoners were required by the Constitution, we might be able to enforce this provision, notwithstanding the state's protest." 700 F.2d at 574. That language follows immediately the court's discussion of *Edelman* and *Young*. In this context, then, the *Penwell* holding must be stated as follows: Where a provision in a federal court order explicitly runs directly against the state treasury, and cannot be construed as a provision enforcing federal law which will have an ancillary effect on the state treasury (thereby bringing the injunction within the scope approved by *Edelman*), the provision is unenforceable. So construed, *Penwell* does not apply to the present circumstance. First, there is no provision in the consent decree in this case that specifically requires funding

The second major premise of defendants' argument is that even when federal jurisdiction exists, the principle of comity prohibits the entry of relief, even by consent, that extends beyond the measures the Court could have imposed following trial. There is no authority cited by the defendants or discovered by the Court that supports this novel proposition. Indeed, the same proposition was rejected by the United States Supreme Court in *Local 93 (Firefighters) v. City of Cleveland*, *supra*.²⁴

In *Firefighters*, the Supreme Court reviewed a consent decree that indisputably granted to plaintiffs substantive relief that went beyond what could have been granted following a trial on the merits. Faced with a challenge that such relief was unauthorized for that the reason, the Supreme Court rejected the contention. As made clear by a lengthy discussion of the nature of consent decrees, the Court concluded that "a federal court is not necessarily barred from entering a consent decree merely because the decree provides broader relief than the court could have awarded after a trial." 92 L. Ed. 2d at 425. In fact, the Supreme Court held that relief in the form of a consent judgment is constrained only by principles of illegality in that a federal court cannot approve relief that would require a violation of substantive law. There is, of course, nothing in the consent decree in this case which requires the defendants to violate any law.

Defendants' attempt to apply the principles of comity and restraint to the Court's review of a consent decree also suggests a peculiar paradox. Were the Court to re-

by the State of New Mexico. Second, every section of the consent decree in this case is tied to an allegation of federal constitutional deprivation.

²⁴ Defendants' citation to *Nelson v. Collins*, 659 F.2d 420, 429 (4th Cir. 1981) (*en banc*), is inappropriate. In *Nelson v. Collins*, no constitutional violation was established. Understandably, when there is no violation, equity has no standing to provide a remedy. *Nelson* does not support any other principle.

ject a consent judgment, agreed to by the defendants, on the basis of comity considerations, it would thereby be arrogating the authority of duly empowered state officials to determine the proper operation of state institutions—precisely the judicial act that most offends the defendants. The essence of the consent decree—its animation, in the words of the Supreme Court (*see Firefighters, supra* at 425)—is the consent of the party. Here, the properly named state officials, following negotiations, freely agreed to provisions that would govern the operation of the state's prisons. It would be a bizarre perversion of the principle of comity to suggest that a federal court is required, in order to preserve state autonomy, to override the decisions of state officials and substitute its own judgments.

Several references to defendant's brief will suffice to demonstrate the internal contradiction of defendants' argument. In footnote 1, page 2, the defendants contend that "a federal court ordinarily should accept any reasonable remedial proposal made by . . . defendants," citing *New York State Association for Retarded Children, Inc. v. Carey*, 706 F.2d 956, 971 (2d Cir. 1983), *cert. denied*, 464 U.S. 915 (1983). "A federal court is not empowered to 'impose upon [governmental agencies] their views of what constitutes wise economic or social policy.'" Defendants' brief at p. 4, citing *Dandridge v. Williams*, 397 U.S. 471, 486 (1970). Federal courts should exercise "scrupulous regard for the rightful independence of state governments which should at all times actuate the federal courts." *Fair Assessment in Real Estate Association v. McNary*, 454 U.S. 100, 111 (1981).²⁵

²⁵ *McNary* is the only case this Court has discovered that discussed comity as a jurisdictional constraint. Of course, *McNary* arose in the peculiar and unique context of a challenge to a state taxing scheme. The restraint on the federal court in such an action derives from the Tax Injunction Act, 28 U.S.C. § 1341, which prohibits district courts from enjoining state tax activities where

This Court had no cognizable basis on which to alter the structure or detail of the negotiated consent judgment presented to it for review and approval by the parties.²⁶ Given that the civil action was properly before the Court, its review of that judgment was limited to a determination of whether any of the relief contained in the decree was illegal and whether the relief was sufficient to protect the interests of the plaintiffs' class. The Court conducted the appropriate review and consequently approved the consent decree. There is no basis for the Court's independent application of its judgment as to the propriety of the specific relief agreed to by the parties in view of the appropriate presumption that the parties have negotiated at arms length and have agreed that the structure of remedies in the consent decree is a fair resolution of their competing claims.

IX. MODIFICATION.

Defendants' motion also seeks to vacate portions of the 1980 decree. Although the rule under which this relief is sought is not explicated, the structure of the argument makes clear defendants seek relief under Rule 60(b)(4), Fed. R. Civ. P., which provides that relief from final judgment should be granted when "the judgment is void." See Defendants' brief, p. 13. As noted earlier, footnote 1 of defendants' brief suggests that if their comity-based

there is a plain, speedy and efficient remedy in the courts of that state. See 454 U.S. at 103. See also *Tulley v. Griffin*, 429 U.S. 68, 73 (1976), *quoted in* *Rosewell v. Lasalle National Bank*, 450 U.S. 503, 522 (1981).

²⁶ Indeed, when presented with a consent decree compromising a class action, the Court is limited to one of two actions: approving the decree, or rejecting it. It is elemental that in conducting a Rule 23 review of a proposed class action compromise, the Court may not substitute its judgments of fairness for those of the litigants. Plainly, the Court would be without authority to enter a consent judgment other than that agreed to by the parties, since the consent of the parties would no longer animate the decree.

arguments are rejected at the jurisdictional level, they should inform the Court's assessment of the propriety of modification. As is made clear in this order, defendants' jurisdictional arguments seeking vacation of the decree are rejected in that they are unsupported by existing law. The Court is mindful, however, that under certain circumstances, a judgment may be modified or altered in its prospective application. The potential legal bases for action of this kind need not be set out here, although the Court has addressed the issue as a general matter previously. See Order of October 3, 1986. That order evidences the Court's awareness of *United States v. Swift*, 286 U.S. 106 (1932); *New York Association for Retarded Children, Inc. v. Carey* (Willowbrook), *supra*; *Newman v. Graddick*, 740 F.2d 1513 (1st Cir. 1984), and related cases.

The "flexible" approach to modification set out in *Carey* and related cases permits the Court to assess requests for modification that promote the interest of comity by preserving state administrative discretion as to the means of accomplishing the particular objectives set forth in a decree. That process, however, involves careful assessment not only of the structure of the order and its relationship to administrative discretion, but of other factual considerations including, but not limited to, the state of compliance with existing orders, the degree to which any federal constitutional violations have been cured "root and branch," and the existence of safeguards to prevent future violations. That complex inquiry is one the Court will not undertake in the absence of an appropriate, comprehensive evidentiary record and a thorough briefing on the appropriate standards for modification, to include the equitable bases for modification and the particular modification sought.²⁷

²⁷ The Court is mindful that some endeavor to this end has been undertaken previously. The defendants, however, terminated that process by filing the motion that is the subject of this order.

X. CONCLUSION.

The eleventh amendment does not provide immunity to state officials from equitable actions based on federal constitutional rights. The comity limitations urged by the defendants do not require the Court to interfere with the considered judgments of parties in the fashioning of the consent judgment. The defendants' motion to vacate will be denied.

Wherefore,

IT IS ORDERED, ADJUDGED AND DECREED that defendants' motion to vacate be, and the same hereby is, denied.

DATED this 11th day of February, 1988.

/s/ Juan G. Burciaga
United States District Judge

APPENDIX C

UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

No. 88-1442 (D.C. No. 77-0721-JB)

DWIGHT DURAN, LONNIE DURAN, SHARON TOWERS,
and all others similarly situated,
Plaintiffs-Appellees,

v.

GARREY CARRUTHERS, GOVERNOR OF THE STATE OF NEW
MEXICO, O.L. McCOTTER, SECRETARY OF CORRECTIONS,
and ROBERT TANSY, WARDEN OF THE PENITENTIARY OF
NEW MEXICO, *Defendants-Appellants,*

and

MOUNTAIN STATES LEGAL FOUNDATION, Amici Curiae,
on behalf of its members, the State of Kansas and the
State of Utah,

and

Amici Curiae of the STATES OF HAWAII, OREGON, UTAH,
WASHINGTON, and WYOMING, in support of Appellants.

JUDGMENT

Entered September 15, 1989

Before SEYMOUR, McWILLIAMS, and EBEL, Circuit
Judges.

This cause came on to be heard on the record on appeal from the United States District Court for the District of New Mexico and was argued by counsel.

Upon consideration whereof, it is ordered that the judgment of that court is affirmed.

Entered for the Court

/s/ Robert L. Hoecker
ROBERT L. HOECKER
Clerk

APPENDIX D

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW MEXICO

No. Civil 77-721-C

DWIGHT DURAN, LONNIE DURAN, and SHARON TOWERS,
and all others similarly situated,
Plaintiffs,

vs.

JERRY APODACA, Governor of the
State of New Mexico, *et al.*,
Defendants.

ORDER

[Signed July 14, 1980; entered July 15, 1980]

THIS MATTER having come on before the Court on the agreement of the parties and the Court being advised that this is a class action proceeding pursuant to Rule 23(b)(1) and (2) of the Federal Rules of Civil Procedure and the class was previously certified as all inmates who are now, or in the future may be incarcerated in the Penitentiary of New Mexico at Santa Fe. By agreement of the parties and because of changed circumstances, the class is hereby amended to include all those inmates who are now, or in the future may be; incarcerated in the Penitentiary of New Mexico at Santa Fe or at any maximum, close, or medium security facility open for

operation by the State of New Mexico after June 12, 1980; and the Court having examined the agreement finds:

(1) that the agreement represents a compromised settlement of disputes between the parties;

(2) that the agreement and the policy statements attached thereto and the partial consent decrees on file herein may include specific requirements and procedures beyond what is required by the Constitution of the United States, the Constitution of the State of New Mexico, the Federal Civil Rights Act, the New Mexico Tort Claims Act, or any other constitutional, statutory, or common law requirement. The agreement and the policies attached thereto and the partial consent decrees on file herein are not to be construed to establish or change the standard of culpability for civil or criminal liability of any official, employee, agent, or representative of the State of New Mexico other than for the sole and limited purpose of enforcement of the agreement and the policies attached thereto and the partial consent decrees on file herein.

(3) that the agreement and policy statements attached thereto and the partial consent decrees on file herein were voluntarily and mutually agreed upon by the Defendants and Plaintiffs as a compromised settlement of disputes between the parties and neither the partial consent decrees, nor the agreement and the policy statements attached thereto constitute admissions that any previous or existing condition, policy, procedure, or acts or omissions of the Department of Corrections and the Penitentiary of New Mexico or any state official, employee, or agent was, or is, in any way improper, negligent, unconstitutional, or in violation of any rights of the Plaintiff class. Nothing in this Order or in the agreement and policy statements attached thereto or the partial consent decree on file herein constitute findings of fact or law

with respect to the claims or defenses of the parties in *Duran v. Apodaca*.

(4) that the agreement should not be admissible in evidence in any proceedings or trials other than for the sole and limited purpose of enforcement of this agreement and the policies attached thereto and the partial consent decrees on file herein. Specifically, it is understood and agreed that Rules 407 and 408 of the Federal Rules of Evidence are applicable to this agreement and the policies attached hereto and the partial consent decrees on file herein.

(5) that the agreement is far and appropriate and should be confirmed and adopted by the Court.

IT IS THEREFORE ORDERED, ADJUDGED, AND DECREED as follows:

(1) The agreement of the parties is approved and adopted in all particulars.

(2) The Defendants, their agents, employees, successors in office and those acting in concert with them, are hereby ordered to comply in full with the terms of the agreement and the policies attached thereto and the prior partial consent decrees of this Court.

(3) Pursuant to Rule 23(g) F.R.C.P., the Defendants are ordered to provide notice of this Order and settlement to all inmates presently confined at the Penitentiary of New Mexico. The notice will include a statement that the Order and settlement are provisional until fifteen (15) days after said notice during which time class members may submit written objections to the Order and settlement to the Clerk of this Court. Any such objections will be considered fully by the Court. This Order will become final if not rejected or modified by agreement of the parties based upon said objections within thirty (30) days.

(4) If this Order and settlement becomes final, the Court will maintain jurisdiction for such time as is necessary to enforce or modify this Order and settlement with, if necessary, all appropriate orders including contempt sanction.

Signed this 14th day of July, 1980.

/s/ Santiago E. Campos
United States District Judge

APPROVED BY:

/s/ Ralph I. Knowles, Jr.
Attorneys for Plaintiffs

/s/ Charles Daniels
Attorneys for Plaintiffs

/s/ Ralph W. Muxlow II
Attorneys for Defendants

/s/ David A. Freedman
Attorneys for Plaintiffs

/s/ Jeff Bingham
Attorneys for Defendants

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW MEXICO

No. Civil 77-721-C

DWIGHT DURAN, LONNIE DURAN, and SHARON TOWERS,
and all others similarly situated,
Plaintiffs,

vs.

JERRY APODACA, Governor of the
State of New Mexico, *et al.*,
Defendants.

AGREEMENT

COME NOW the parties and stipulate and agree as follows:

1. The parties have reached agreement on several areas of policy and procedure for operation of the Penitentiary of New Mexico and any other State correctional facility which will house class Plaintiffs, except for minimum security facilities. These areas of agreement are more fully set forth in partial consent decrees on file herein and in various policy statements which are attached to this agreement as Exhibits A through H. These policy statements will be adopted by the Defendants within seven (7) days from the date the Court Order approving this agreement becomes final.

2. These policy statements and the partial consent decrees on file herein may include specific requirements and procedures beyond what is required by the Constitution of the United States, the Constitution of the State of New Mexico, the Federal Civil Rights Act, the New Mexico Tort Claims Act, or any other constitutional, statutory, or common law requirement. This agreement and the policies attached hereto and partial consent decrees on file herein are not to be construed to establish or change the standard of culpability for civil or criminal liability of any official, employee, agent, or representative of the State of New Mexico other than for the sole and limited purpose of enforcement of this agreement and the policies attached hereto and the partial consent decrees on file herein.

3. This agreement and the policies attached hereto and the partial consent decrees on file herein were voluntarily and mutually agreed upon by the Defendants and Plaintiffs as a compromised settlement of disputes between the parties and neither the partial consent decrees, nor this agreement and the policies attached hereto constitute admissions that any previous or existing condition, policy, procedure, or acts or omissions of the Department of Corrections and the Penitentiary of New Mexico or any state official, employee, or agent was, or is, in any way improper, negligent, unconstitutional, or in violation of any rights of the Plaintiff class. Nothing in this agreement or the partial consent decrees on file herein constitute findings of fact or law with respect to the claims or defenses of the parties in *Duran v. Apodaca*.

4. This agreement should not be admissible in evidence in any proceedings or trials other than for the sole and limited purpose of enforcement of this agreement and the policies attached hereto and the partial consent decrees on file herein. Specifically, it is understood and agreed that Rules 407 and 408 of the Federal Rules of Evidence and the Advisory Committee's notes to Rule 407 and 408

and of Rules 407 and 408 of the New Mexico Rules of Evidence are applicable to this agreement and the policies attached hereto and the partial consent decrees on file herein.

5. In the event of an emergency caused by a riot, fire, or other events at the facility not caused by the Defendants, their agents, employees, successors in office, and those acting in concert with them which make compliance with the terms of this agreement and the policies attached hereto and the partial consent decrees on file herein impossible, it may be necessary to temporarily suspend certain provisions of this agreement and the policies attached hereto and the partial consent decrees on file herein. In such event, the Defendants must formally declare a state of emergency, and, as soon as practical, but no later than five (5) days after such declaration, notify the Plaintiffs and their counsel of the reasons which necessitated the suspension of such suspended provisions. The Defendants will also notify counsel for Plaintiffs of the expected duration of such suspension and the plan of the Defendants to restore said provisions. If the Plaintiffs or their counsel believe those suspensions and/or their duration are unjustified, unreasonable, or taken in bad faith, then they may request appropriate relief from this court.

6. Other than in times of emergency, changed circumstances may, in the future, justify some changes in this agreement and the policies attached hereto and the partial consent decrees on file herein. No change or changes may be made which will lessen the benefits provided by the agreement and the policies attached hereto and the partial consent decrees on file herein. Notice will be given to the lawyers for the Plaintiffs at least thirty (30) days prior to the proposed implementation date. Said notice will contain the proposed change or changes and the reasons therefore. Counsel for the Plaintiffs will ascertain whether, in their opinion, the proposed change

or changes in any way lessen the benefits provided by this agreement or the policies attached hereto and the partial consent decrees on file herein. If so, they will notify Defendants of their objections and the reasons therefore within fifteen (15) days. Efforts will be made to informally resolve the matter. If the dispute cannot be resolved, it will be submitted to the court. The burden will then be on the Defendants to justify that the change or changes should be made and will not lessen the benefits provided by the agreement and the policies attached hereto and the partial consent decrees on file herein before the change or changes will be allowed.

7. Noncompliance with the agreement and the policies attached hereto and the partial consent decrees on file herein shall result in disciplinary action against any non-complying state employee(s). This provision in no way limits remedies otherwise available to the parties to enforce this agreement and the policies attached hereto and the partial consent decrees on file herein.

8. The parties further agree that as of the date of this agreement, the Plaintiff class in *Duran v. Apodaca* shall be defined as "all persons who are now, or in the future may be, incarcerated in the Penitentiary of New Mexico at Santa Fe or at any maximum, close or medium security facility opened for operation by the State of New Mexico after June 12, 1980." All provisions of this agreement will be followed at those institutions except those provisions which are not generally applicable and which are required by unique conditions at the Penitentiary of New Mexico at Santa Fe.

9. The Defendants will appoint a responsible person to report on compliance with the agreement and the policies attached hereto and the partial consent decrees filed herein. Such reports will be sent quarterly to counsel for Plaintiffs.

10. The parties shall submit this agreement to the Court in full settlement of all remaining issues in this

case, except costs and attorney's fees and the parties shall request that the Court retain jurisdiction for such time as the Court deems necessary to enforce compliance with this agreement and the policies attached hereto and the partial consent decrees on file herein.

11. Any modification of the Order of the Court which may be made in the future shall modify this agreement and the policy statements to be consistent with this Order, as so modified.

/s/ Ralph I. Knowles, Jr.
Attorneys for Plaintiffs

/s/ Charles Daniels
Attorneys for Plaintiffs

/s/ Ralph W. Muxlow II
Attorneys for Defendants

/s/ David A. Freedman
Attorneys for Plaintiffs

/s/ Jeff Bingaman
Attorneys for Defendants

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW MEXICO

Civil Action No. 77-721-C

DWIGHT DURAN, *et al.*,
Plaintiffs,
vs.

JERRY APODACA, *et al.*,
Defendants.

JOINT REQUEST FOR PARTIAL CONSENT
DECREE

[Filed Apr. 18, 1979]

Come now the parties in the above styled case and jointly request that the Court enter a partial consent decree in settlement of those allegations made in the Amended Complaint in paragraph 28 relating to correspondence policies and practices. The provisions which the parties have agreed to and which this Court is asked to approve and adopt as its order are as follows:

1. Policy Statement PNM-77-IM-60001-1, 07-27-77, Subject: Correspondence Regulations, will be replaced by the Policy Statement attached to this motion as Exhibit A. The new policy statement will be provided to all prisoners as soon as is practical after this order is entered but in

any event no later than 21 days after the entry of said order.

2. There will be no requirement that prisoners sign a waiver of their right to object to the opening of their mail or to take legal action to assure continuing adherence to constitutional standards in correspondence policies and practices.

3. The defendants will maintain records for at least one year after the signing of this order indicating any documents rejected by the three member Publication Review Panel along with the reasons for the rejection. In addition, the documents rejected will be retained. The described records and documents will be made available to counsel for the plaintiffs to examine at any time upon reasonable notice. In the event counsel for the plaintiffs subsequently determine that the policy statement is being executed in such a manner as to apparently violate constitutional rights of prisoners, they may by appropriate motion with the Court raise the issues presented for a determination by the Court and appropriate relief, if any.

4. If the Court adopts §§ 1, 2 and 3 above then it should also dismiss the allegations of paragraph 28 of the Amended Complaint from the trial of this case except for its retention of jurisdiction to enforce said order.

Submitted by,

/s/ Edwin Macy
For the Plaintiffs

/s/ Ralph W. Muxlow II
For the Defendants

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW MEXICO

Civil Action No. 77-721-C

DWIGHT DURAN, *et al.*,
Plaintiffs,
vs.

JERRY APODACA, *et al.*,
Defendants.

ORDER

[Filed Apr. 18, 1979]

The parties to the above styled litigation have presented the Court with a Joint Request For Partial Consent Decree which would result in a settlement of the issues raised by the allegations in Paragraph 28 of the Amended Complaint relating to correspondence policies and practices. The Court has considered the said Joint Request and the terms of the proposed settlement and has determined that the proposed Partial Consent Decree would be in the interest of justice to the parties and should be entered.

Wherefore, premises considered, the defendants, individually and in their official capacities, their agents, employees, successors in office and any others acting in concert with them, are hereby enjoined from failing to implement fully and within the times prescribed each of the following requirements:

1. Policy Statement PNM-77-IM-60001.1, 07-27-77, Subject: Correspondence Regulations, will be replaced by the Policy Statement attached to this order as Exhibit A. The new policy statement will be provided to all prisoners and will be operational as soon as is practical after this order is entered but in no event later than 21 days after the entry of said order.

2. There will be no requirement that prisoners sign a waiver of their right to object to the opening of their mail or to take legal action to assure continuing adherence to constitutional standards in correspondence policies and practices.

3. Records will be maintained for at least one year after the signing of this order indicating any documents rejected by the three member Publication Review Panel along with the reasons for the rejection. In addition, the documents rejected will be retained. The described records and documents will be made available to counsel for the plaintiffs for examination and copying at any time upon reasonable notice. In the event counsel for the plaintiffs subsequently determine that the policy statement is being executed in such a manner as to apparently violate constitutional rights of prisoners, they may by appropriate motion with the Court raise the issues presented for a determination by the Court as to what relief, if any, should be granted.

4. The allegations of Paragraph 28 of the Amended Complaint relating to correspondence policies and practices are dismissed from the trial of this case. The Court retains jurisdiction to enforce this order.

Done this 18th day of April, 1979.

/s/ Santiago E. Campos
SANTIAGO E. CAMPOS
United States District Judge

POLICY STATEMENT

SUBJECT: CORRESPONDENCE REGULATIONS

1. *POLICY*: It is the policy of this institution to encourage correspondence on a wholesome and constructive level between inmates and members of their families, as well as other friends or associates, with no restrictions except those necessary to insure the safety and security of the institution and other persons.
2. *PURPOSE*: The purpose of this Policy Statement is to outline, in specific terms, the regulations applicable to inmate correspondence.
3. *GENERAL POLICY*: Inmates may correspond with any person and there is no limit upon the number of correspondents an inmate may have. However, correspondence may be rejected by prison officials pursuant to the other rules as stated in this Policy Statement.
4. *MAILING OF LETTERS*: Inmates who are indigent and unable to afford to pay for postage will be provided with a reasonable amount of postage to be supplied regularly by the institution. Postage for legal mail of all inmates will be supplied by the institution.

Outgoing letters for the general population will be deposited in the corridor mail drop across from the inmate dining room exit. Letters, except for those to privileged communicants, will be deposited unsealed. Letters must be written in English or Spanish except when another language of correspondence has been approved, in advance, by the Deputy Warden/Programs. Inmates will not modify institutional stationery in any way and the sender's name,

number and living quarters assignment must appear on all outgoing mail.

5. *INSPECTION OF MAIL*: All outgoing mail from inmates, except for privileged correspondence, will be inspected for contraband.

Outgoing mail will be read if there is reasonable cause to believe that the mail contains escape plans, other plans to commit a crime or to violate institutional rules of regulations, or constitutes a crime in and of itself.

6. *REJECTION OF LETTERS*: All inmates will be held responsible for the contents of their outgoing letters and deliberate violations may result in a misconduct report. Violations of Postal Laws may result in referral for prosecution to Federal authorities.

Rejected mail may be withheld, photocopied and filed for future reference.

When any mail is rejected, the inmate and the correspondent will be notified, in writing, as to the reason for rejection and a copy of the notification will be placed in the inmate's central file.

Rejected mail notifications must receive final signature approval of the Deputy Warden/Programs. Any inmate whose mail is rejected may contest the rejection through the inmate grievance procedure.

Outgoing mail will be rejected when the mail contains contraband, escape plans, other plans to commit a crime, or to violate institutional rules and regulations, or would constitute a crime in and of itself.

Incoming mail will be rejected for the following reasons:

- (a) There is a clear and present danger that the mail will endanger the internal security of

the institution, contains escape plans or other plans involving the prisoner in the commission of a crime, or the violation of institutional rules and regulations, or would constitute a crime in and of itself.

- (b) The mail contains codes or other attempts to circumvent correspondence regulations.
- (c) The material is obscene in that it appeals primarily to the prurient interest or is patently offensive. A three member publication review panel will be established by the warden with the authority to approve or reject materials that are alleged to be obscene. The panel will have the authority and responsibility to review allegedly obscene publications and correspondence to determine whether to reject the documents pursuant to this section.
- (d) Junk mail, pamphlets, leaflets, brochures, etc., will be judged by the same standards as other correspondence. However, any incoming mail not addressed to a prisoner ("occupant"-type addressees) may be discarded at the discretion of prison officials.

7. *INCOMING MAIL ENCLOSURES:*

Money, in the form of a cashier's check or money order, may be sent to any inmate. Cash or personal checks should not be enclosed.

Photographs will be rejected only pursuant to the same standards and procedures as publications. Photos must be sent in without frames so they can be properly inspected without damage. An inmate may not have a picture of him/herself, alone, for security reasons.

Stamps, personal stationery, and self-addressed stamped envelopes are not permitted.

8. *CERTIFIED AND REGISTERED MAIL:*

Incoming certified and registered mail for inmates will be processed as all other mail, but delivered to the addresses only upon securing a signed receipt for same.

Outgoing certified and registered mail is permitted if the inmate sender has the funds to pay for such service.

9. *PRIVILEGED CORRESPONDENCE:*

Outgoing letters to attorneys, the courts, elected governmental officials, the news media, grand juries, law enforcement agents or agencies, the Secretary of Corrections, Corrections Commissioners, and the Parole Board are considered privileged correspondence and will not be opened for inspection.

Letters in this category should be sealed by the inmate and dropped in the special box provided for such letters.

Incoming letters from privileged communicants will not be opened unless the warden or his designee determines that there is reasonable cause to believe that it is counterfeit or contains contraband. When such mail is opened, it will be opened in the presence of the inmate in an appropriate, secure area of the institution by the warden or his designee. The required form will be prepared and the correspondent and the inmate will be notified by the warden or his designee that the mail was opened and the reason for the opening. The notification to the correspondent will be signed by the warden.

10. *CORRESPONDENCE WITH THE CLERGY:*

Clergy are not considered privileged correspondents.

11. Books and magazines will be accepted and delivered to inmates if they are received directly from the publisher or vendor. Exceptions to this rule to allow receipt of books and magazines from other persons may be made by the warden for reasons of indigence or other good cause. Such exceptions will not be based upon the content of the publication.

12. *INCOMING PACKAGES FOR INMATES:*

Inmates will be allowed to receive packages if they are sent directly from vendors and if the contents are allowed to be retained by inmates and are not available from the canteen, and unless said items cannot reasonably be examined for contraband. Approval for receipt of said packages must be given in advance by the Deputy Warden/Programs pursuant to the provisions of this section. All packages shall be subject to being searched for contraband.

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW MEXICO

Civil Action No. 77-721-C

DWIGHT DURAN, *et al.*,
Plaintiffs,

vs.

JERRY APODACA, *et al.*,
Defendants.

ORDER

[Filed Aug. 21, 1979]

The parties to the above styled litigation have presented the Court with a Joint Request for Partial Consent Decree which would result in a settlement of the issues raised by the allegations in Paragraphs 27 and 30 of the Amended Complaint insofar as they relate to attorney-prisoner visitation. The court has considered the said Joint Request and the terms of the proposed settlement and has determined that the proposed Partial Consent Decree would be in the interest of justice to the parties and should be entered.

Wherefore, premises considered, the defendants, individually and in their official capacities, their agents, employees, successors in office and any other acting on concert with them, are hereby enjoined from failing

to implement fully and within the times prescribed each of the following requirements:

1. The Policy Statement attached to this motion as Exhibit A will replace any and all presently existing policies or practices at the Penitentiary of New Mexico governing visits by attorneys and/or their agents with prisoners incarcerated at the Penitentiary of New Mexico.

2. The new Policy Statement will be provided to all prisoners and put into effect by the defendants as soon as is practical, but in no event later than 21 days, after the entry of said order of this Court.

3. The allegations of Paragraphs 27 and 30 of the Amended Complaint insofar as they relate to attorney-prisoner visitation are dismissed from the trial of this case.

4. The Court retains jurisdiction to enforce this order.
Done this 21st day of August, 1979.

/s/ Santiago E. Campos
SANTIAGO E. CAMPOS
United States District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW MEXICO

Civil Action No. 77-721-C

DWIGHT DURAN, *et al.*,
Plaintiffs,
vs.

JERRY APODACA, *et al.*,
Defendants.

JOINT REQUEST FOR PARTIAL
CONSENT DECREE

[Filed Aug. 21, 1979]

Come now the parties in the above styled case and jointly request that the Court enter a partial consent decree in settlement of those allegations made in the Amended Complaint in paragraphs 27 and 30 insofar as they relate to attorney-prisoner *visitation*. The provisions which the parties have agreed to and which this Court is asked to approve and adopt as its order are as follows:

1. The Policy Statement attached to this motion as Exhibit A will replace any and all presently existing policies or practices at the Penitentiary of New Mexico governing visits by attorneys and/or their agents with prisoners incarcerated at the Penitentiary of New Mexico.

2. The new Policy Statement will be provided to all prisoners and put into effect by the defendants as soon as is practical, but in no event later than 21 days, after the entry of said order of this Court.

3. If the Court adopts Sections 1 and 2 above, then it should also dismiss the allegations of Paragraphs 27 and 30 of the Amended Complaint insofar as they relate to attorney-prisoner visitation from the trial of this case except for its retention of jurisdiction to enforce said order. -

Submitted by:

/s/ [illegible]
For the Plaintiffs

/s/ Ralph W. Muxlow II
For the Defendants

POLICY STATEMENT

[Filed Aug. 21, 1979]

SUBJECT: ATTORNEY VISITATION

Any inmate has the right to consult with an attorney under reasonable regulations providing for the security of the institution and the safety of the inmate population and staff, as herein stated.

a. Visits by attorneys (or other appropriate persons acting for an attorney), requested by an inmate, his family, or other persons acting for and on behalf of the inmate, to discuss legal matters, shall be permitted. No inmate or attorney (or other appropriate person) shall be required to reveal the nature and substance of the legal matter to be discussed at said visitation. The PNM reserves the right to utilize appropriate security measures to determine whether or not an appropriate person, other than an attorney, fulfills the requirements of this regulation to meet with a particular inmate. (This class of persons, who are not attorneys, would ordinarily be limited to law students, law clerks, investigators, and the like.) Normally, a written confirmation by an attorney designating an appropriate person to visit for him or her will be sufficient to allow the visit. Hereinafter, the term 'attorney' includes other such appropriate persons, as defined.

b. If prior to the initial meeting between attorney and inmate, prison officials, for some articulable and justifiable reason, believe that the visit by said attorney was not requested by the inmate, his/her family, or person acting for and on behalf of the inmate, the prison officials may require a showing that the visit was so requested.

Any of the following will be deemed sufficient to make such a showing:

1) A written confirmation by the inmate of the request;

2) Production of the part of a written document of the inmate making the request for the visit;

3) Any other credible information which would establish that the attorney has responded to a request for a visit by the inmate, his or her family, or a person acting for the inmate and on his behalf.

c. An attorney shall meet with one inmate at a time, unless it is determined that it would be appropriate for the attorney to meet with more than one inmate at a particular time. This would be appropriate in a situation in which an attorney needs to speak to two or more inmates about the same matter. PNM officials will make the determination as to whether or not it is appropriate for an attorney to meet with more than one inmate at a particular time. The attorney who wants to meet with more than one inmate at a particular time must make an appropriate request to PNM officials and it will be considered by PNM officials on the basis stated herein.

d. The Deputy Warden/Programs should be notified by telephone or in writing by any licensed attorney who plans to visit any inmate. This notification should be made by 2:00 p.m. of the work day prior to the visit so that a written clearance memo can be prepared and the interview room reserved accordingly. In the event the visit is denied, the Deputy Warden/Programs will notify the attorney by telephone with an explanation as to the denial.

e. Each attorney who plans to visit any inmate under the attorney/client relationship must present bona fide evidence of his license to practice law, such as a state bar membership card and matching identification, such as a driver's license, etc.

f. Attorneys and inmates will make their relationship known on the initial visit by both signing the attached form referred to as 'Form A'. (Form A is solely for PNM's internal use and does not limit an inmate's access to a particular attorney(s). Moreover, Form A does not limit the attorney-client relationship to pending litigation or appeals. The form simply identifies the relationship of attorney and client for record keeping purposes should a question arise concerning a future visit by the attorney).

Form A

The Penitentiary of New Mexico

Santa Fe, New Mexico

LEGAL CONSULTATION FORM

I am requesting the following person or persons consult with me concerning legal matters:

Name of attorney(s) _____

Name of inmate _____

Date _____

I am the attorney whose name appears above:

Signature _____

Address _____

Telephone _____ State of Bar Membership _____

cc. Central File

Deputy Warden File

Date _____

g. Regular visitation hours for attorneys are from 8:30 a.m. to 11:30 a.m., 1:00 p.m. to 3:45 p.m. Monday through Friday only. There will be no regularly scheduled attorney visits on legal holidays or weekends because of lack of staff and crowded social visiting conditions. PNM will attempt to facilitate a visit by a licensed attorney at times other than those specified herein, depending on staff and space availability, regardless of whether or not the normal procedures outlined above are followed. Such a visit must be approved in advance by the Deputy Warden/Programs.

h. Prison officials may inspect attorney briefcases, tape recorders, cameras, etc. for contraband. However, prison officials shall not read the contents of any written material contained therein. All inspections of briefcases or other containers of the attorney shall be conducted in the presence of the attorney.

i. Documents sought to be exchanged or retained by the inmate or attorney shall be examined (but not read) by the Chief Classification Officer or the caseworker (or the staff member) for the purpose of inspecting for contraband or other violations of PNM regulations. In the event no contraband or other violation of PNM regulations is present, the document or article shall be allowed to be exchanged or retained by the inmate or attorney. Witnessing or notarizing of an inmate's signature can be arranged by the case manager.

j. The foregoing procedures will be enforced in the absence of a bona fide emergency. PNM will make every reasonable effort to facilitate a visit between any licensed attorney and his inmate-client in the event of a bona fide emergency. Such an emergency must be demonstrated by the inmate or the lawyer to the satisfaction of PNM officials. An emergency visit must be approved in advance by the Deputy Warden/Programs.

k. The officials of the Penitentiary of New Mexico will make these regulations available to inmates and attorneys seeking visitation rights. Said officials may also refuse visitation of attorneys or agents who knowingly fail to comply with them. If prison officials have reason to believe that an attorney has misrepresented his identity or qualifications as an attorney in good standing, or the status of his agent, PNM may refer the matter to the New Mexico Attorney General's Office, and in turn, the matter may be referred by the New Mexico Attorney General's Office to the ethics committee of the New Mexico Bar Association or other appropriate bar association.

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW MEXICO

Civil Action No. 77-721-C

DWIGHT DURAN, *et al.*,
Plaintiffs,
v.

JERRY APODACA, *et al.*,
Defendants.

JOINT REQUEST FOR PARTIAL CONSENT DECREE

[Filed Dec. 7, 1979]

Come now the parties in the above styled case and jointly request that the Court enter a partial consent decree in settlement of those allegations made in the Amended Complaint in paragraph 21 *relating to food service* at the Penitentiary of New Mexico (PNM). A number of the conditions which the plaintiffs allege existed at the time this lawsuit was filed and to which some of the provisions of this Partial Consent Decree are addressed are presently corrected. The provisions which the parties have agreed to and which this Court is asked to approve and adopt as its order are as follows:

1. The defendants will make arrangements for a qualified dietician to come to the facility quarterly, examine

the food being served, examine documents showing the food served, and take appropriate actions, as necessary, to determine whether the food being served is nutritionally adequate and sanitary.

2. While at the P.N.M. the above mentioned dietician will meet with food services personnel and one representative of the Inmate Council selected by a vote of the members of the Council to discuss issues concerning the service of food to inmates.

3. A procedure will be established and made available to all inmates which informs them as to how they might gain access to meals in accord with legitimate religious requirements.

4. Provisions will be made to provide adequate diets to persons with legitimate religious requirements which meet those requirements.

5. For Muslims and Jews, the corrections officials will at a minimum:

(A) clearly mark on all menus all foods which contain pork, pork derivatives, pork by-products, or pork seassings;

(B) provide three meals a day to inmates who do not eat pork which are nutritionally adequate and generally similar in nutritional value to the meals provided to inmates who do eat pork;

(C) at one meal a day at which pork, pork derivatives or pork by-products are served as the principal item, the defendants shall provide a substitute item which is similar in nutritional value for inmates who do not eat pork;

(D) thoroughly cleanse the institution's dishware and cutlery so that those items which have come into contact with pork in any way will be free from pork.

6. The defendant corrections officials shall maintain food to be served warm at temperatures of at least 140° F until the food is actually given to the prisoner to eat. Food to be served cold shall be maintained at a temperature of no higher than 45° F until actually served. These standards will be met not only in the cafeteria but also in other places where food is served such as segregation areas.

7. The defendant corrections officials shall maintain a dishwashing temperature of at least 180° F for the washing of all items to be used again by prisoners. A daily log will be kept of temperature readings.

8. The defendant corrections officials shall maintain sneezeguards on the food service line in the cafeteria.

9. The physical structure of the food service, food preparation and food storage areas will be rat and rodent proofed. (E.g., holes and other structural defects allowing the entrance into the area from other locations will be corrected and thereafter properly maintained.) The parties acknowledge that while this provision will assist in keeping rodents out of the food service, it does not provide an absolute guarantee that no rodent will ever enter the area.

10. A program of routine daily housekeeping and an effective roach and rodent extermination program designed to prevent and eradicate roaches and rodents will be carried out.

11. All windows and doors will have effective screens placed on them and maintained so as to prohibit the entry of flies and other animals or insects in the food service and preparation areas. These screens shall be in place by the conclusion of the ongoing Phase II Renovation or May 1, 1980, whichever comes first.

12. Handwashing facilities will be provided in the food service area.

13. No cross connections between the potable water supply and the waste water system will be permitted in the food service area.

14. A garbage grinder or waste disposal system so as to solve problem of waste attracting roaches, rats and other vermin will be operated in the food preparation and service areas.

15. A written preventive maintenance program for the cleaning and maintenance of all food preparation and service equipment will be utilized.

16. A routine daily cleaning program for the food service and preparation areas with specific duties assigned to specific personnel will be utilized.

17. All food service and food preparation personnel (civilian and prisoner) shall comply with local and state health regulations for food handlers.

18. The defendants shall provide clean white outer garments for food service personnel (civilian or prisoner) to wear whenever they come into contact with food.

19. The defendant corrections officials will make good faith efforts to hire the additional two civilian staff members the head of food services indicated he needed in order to be adequately staffed.

20. The defendant corrections officials shall arrange for a semi-annual inspection of the food service and preparation areas by the state fire marshall or other qualified fire safety inspector to insure that these areas meet the requirements of the state fire code and the Life Safety Code, shall maintain on file the results of these inspections and shall provide fire safety equipment over the grills in the food service and preparation areas.

21. The defendant corrections officials shall comply with all New Mexico food service, preparation and protection standards, arrange for at least quarterly inspec-

tions and reports by the state public health office to assure continued consultation and compliance and maintain said reports on file at the facility.

22. Inmates who have medical needs for special diets will be provided with the diet prescribed by the PNM physician or other PNM authorized medical personnel.

Submitted by:

/s/ [Illegible]
For the Plaintiffs

/s/ [Illegible]
For the Defendants

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW MEXICO

Civil Action No. 77-721-C

DWIGHT DURAN, *et al.*,
Plaintiffs,
vs.

JERRY APODACA, *et al.*,
Defendants.

ORDER

[Filed Dec. 7, 1979]

The parties to the above styled litigation have presented the Court with a Joint Request for Partial Consent Decree which would result in a settlement of the issues raised by the allegations in Paragraphs 30 and 31 of the Amended Complaint insofar as they *relate to inmate legal access*. The court has considered the said Joint Request and the terms of the proposed settlement and has determined that the proposed Partial Consent Decree would be in the interest of justice to the parties and should be entered.

Wherefore, premises considered, the defendants, individually and in their official capacities, their agents, employees, successors in office and any other acting in

concert with them, are hereby enjoined from failing to implement fully and within the times prescribed each of the provisions of the attached Joint Request for Partial Consent Decree and the allegations of Paragraphs 30 and 31 of the Amended Complaint insofar as they relate to inmate legal access are dismissed from the trial of this case.

The Court retains jurisdiction to enforce this Order.

Done this 7th day of Dec., 1979.

/s/ Santiago E. Campos
SANTIAGO CAMPOS
United States District Court Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW MEXICO

Civil Action No. 77-721-C

DWIGHT DURAN, *et al.*,
Plaintiffs,
v.

JERRY APODACA, *et al.*,
Defendants.

JOINT REQUEST FOR PARTIAL CONSENT
DECREE

[Filed Dec. 7, 1979]

Come now the parties in the above styled case and jointly request that the Court enter a partial consent decree in settlement of those allegations made in the Amended Complaint in paragraphs 30 and 31 relating to inmate legal access. The provisions which the parties have agreed to and which this Court is asked to approve and adopt as its order are as follows:

1. The Penitentiary of New Mexico will have available to inmates housed therein two law libraries. The law library which is a part of the general prison library will in the future be utilized by inmates who are not housed in any of the segregation units of the prison.

The library located on the top tier of Cellblock 4 will be utilized by inmates housed in Cellblocks 3 and 4.

2. The general population law library will be open at least six hours a day on Wednesday, Thursday, Friday, Saturday and Sunday. Unless there are fewer custodial staff at the prison than are authorized by the budget, the library will also be open at least 6 hours a day on Monday and Tuesday. The defendants will also make good faith efforts consistent with adequate staff availability to make arrangements so that the library can be opened at night.

3. The Cellblock 4 library shall be open for at least four hours per day Monday through Friday. Normally, inmates housed in Cellblock 4 will utilize the library in the morning and those housed in Cellblock 3 will utilize it in the afternoon. The defendants will make good faith efforts to extend the hours of operation of this library if inmates are making more requests for the use of the library than the time provided will allow. This expansion of the hours of the operation of the library may be contingent upon the availability of a full complement of authorized staff. Inmates housed in segregation units will not be required to forfeit time allotted for recreation in order to use the library.

4. The defendants will assure that all inmates at the Penitentiary of New Mexico have reasonable access to one of the law libraries pursuant only to the notice provisions of ¶ 5 below. Permission to visit either library will not be subject to an approval basis.

5. Inmates desiring to utilize the general library will gain access through notification of their case-manager or other person designated by the prison authorities. Inmates desiring to utilize the Cellblock 4 library will submit a request to the officer in charge of the unit. The inmate requesting to use either library will be given

access at the next available time. In any event, the inmate will be given access to the library within the next two working days. (A working day is a day the library is open.) Additional emergency requests for use of the law libraries will be granted if possible by the Associate Warden for Inmate Management, Deputy Wardens or other designated officials. Access will be on a first-come, first-serve basis and requests will be granted until the capacity limits of the libraries are reached.

6. As in the present practice of officials at the Penitentiary of New Mexico, inmates will not be handcuffed while they are using the law libraries.

7. Job positions as legal assistants will be created in each law library. They will be paid in accordance with the incentive pay program at the penitentiary. They will be given training. There will be a legal assistant on duty during the normal operations of the libraries. Spanish-speaking legal assistants will be available to those Spanish-speaking inmates who cannot adequately understand the English language. Efforts to facilitate utilization of paralegal personnel from civilian sources will be pursued by the defendants.

8. Typewriters in useable condition will be maintained in each library for use in preparing legal documents. In addition to typing paper, carbon paper and onion skin or other suitable paper for extra copies will be made available by the defendants.

9. Forms utilized for filing cases in federal and state courts (e.g., forma pauperis, habeas corpus, civil rights, etc.) will be made available for inmates in both libraries, except when such forms are not available from the courts.

10. At least one tape player will be made available in each library for use by inmates whose trial transcript or other legal matters are on tapes.

11. A copying machine will be made available through the case manager or staff librarian, who will do the copying for the inmates, of documents pertaining to legal matters at a price no higher than the cost to the Penitentiary for making the copies. Provisions will be made to assure that the confidentiality of documents relating to legal matters are preserved.

12. The general population law library will contain at least those books which are listed on Exhibit 1 attached to this document plus all volumes of Federal Supplement and Federal Reporter published since January 1, 1960; Modern Federal Practice Digest and West's Federal Digest 2d; and the relevant volumes of United States Code Annotated including those volumes relating to jurisdiction and procedure, crimes and criminal offenses, civil rights actions and constitutional law.

13. The Cellblock 4 law library will include at least those volumes listed on Exhibit 2 attached to this document.

14. All books or services which provide or require supplementary updating pocket parts of volumes will be kept up to date. If volumes or treatises become outdated, they will be replaced by an up-to-date volume or treatise covering similar subject matters.

15. Inmate access to a notary public will be provided Monday through Friday.

16. The defendants endorse the establishment of, acknowledge the need for and will in good faith seek, a legal services program for inmates at PNM.

17. Inmates who through unnecessary or loud discussion or actions disrupt the orderly operation of either library will be removed. The law libraries will not be utilized for purposes other than legal research or the drafting of documents related to legal matters. Reasonable rules consistent with this order which explains the

procedures for access to, and use of, the libraries will be furnished each inmate. Reinstatement of law library privileges for loss or destruction of property may be contingent upon reimbursement for the value of the lost or destroyed property and the maintenance of proper behavior in the future. Reasonable alternative access to legal resources and/or legal assistance will be provided for those inmates temporarily without access to a law library as a result of a violation of this paragraph.

18. Those actions provided for in paragraphs 1-6 and 8-17 above, which are not dependent upon the completion of the Cellblock 4 library or the arrival of books to be or already ordered, will be implemented as soon as possible but in no event later than 21 days after the entry of the requested order. Paragraph 7 will be implemented no later than December 31, 1979. All other actions provided will be implemented upon completion of the Cellhouse 4 law library, but in any event no later than February 15, 1980.

19. If the Court enters an order as requested concerning the above matters, then it should dismiss the allegations of §§ 30, 31 of the Amended Complaint from the trial of this case except for its retention of jurisdiction to enforce said order.

Submitted by:

/s/ [Illegible]
For the Plaintiffs

/s/ [Illegible]
For the Defendants

EXHIBIT I

PNM Law Library Collection

American Law Reports, 2d & 3d. Quick Index.

American Law Reports, 2d Series.
v.1-90, 1948-1963.

American Law Reports, 3d Series.
v.1- , 1965-

American Law Reports Federal.
v.1- , 1969-

ALR Federal. Quick Index.

Antieau, Chester J. *Modern Constitutional Law.*
2v. Lawyers Co-Op, 1969.

Bailey, F. Lee. *Complete Manual of Criminal Forms,*
Federal and State. 2d ed. Lawyers Co-Op, 1974. 2v.

Bailey, F. Lee. *Handling Narcotic and Drug Cases.*
Lawyers Co-Op, 1972.

Black, Henery C. *Black's Law Dictionary.* Rev. 4th ed.
West, 1968.

Bundy, Mary Lee. *The National Prison Directory.*
Urban Information Interpreters, Inc. 1975.

Calmari, John D. *The Law of Contracts.* West, 1970.

Cleary. *McCormick's Handbook of the Law of Evidence.*
2d ed. West, 1972.

Cohen, Norris L. *Legal Research in a Nutshell.* 2d ed.
West, 1971.

Cook, Joseph G. *Constitutional Rights of the Accused.*
Pre-trial Rights. B-W, 1972.

Corpus Juris Secundum. 101 v. in 117, 1936-

Criminal Law Reporter. 1974-1975: 1977-

Federal Reporter. 2d Series. West. v.1-52, 1924-1931;
v. 61-62, 1932-1933.

Federal Reporter. 2d Series. West. (Paper) 477, No. 4,
8/6/73 to date (Many issues missing)

Federal Supplement. West, v. 180- 1960-

Gard, Spenser A. *Jones on Evidence.* 6th ed 1972. 4v.

Hall, Livingston. *Modern Criminal Procedure.* 3d ed.
West, 1969.

Israel, Jerald H. *Criminal Procedure in a Nutshell.*
West, 1971.

*Jailhouse Lawyer's Manual; How to bring a Federal Suit
Against Abuses in Prison.* San Francisco, Prison Law
Collective. 1973. (Xerox copy).

Konvitz, Milton R. *Bill of Rights Reader.* Cornell U.
Press, 1968.

Krantz, Sheldon. *Law of Corrections and Prisoner's
Rights and Responsibilities.* West, 1973.

LaFave, Wayne R. *Handbook of Criminal Law.* West,
1972.

*Legal Problems of Correctional, Mental Health and Ju-
venile Detention Facilities.* Practising Law Institute,
1976.

Lockhart, William B. *Constitutional Law.* ed. West, 1970.

Lowey, Arnold H. *Criminal Law in a Nutshell.* West,
1975.

A Manual on Habeas Corpus for Jail and Prison Inmates.
Written and compiled by the Prison Law Project. In
cooperation with the Barristers Club of San Francisco.
Berkely. Legal Publications, 1973. (Xerox copy)

Martindale-Hubbell Law Directory. Summit, N.J.: Mar-
tindale-Hubbell, 1972.

Pacific Reporter, 1884-1930. 300v.

Library has all volumes except: 1, 8, 11, 13, 23, 45, 106, 218, 225, 262, 264, 275.

Pacific Reporter, 2d Series. v. 1-66, and 68-93 (1931-1939).

Pacific Reporter, 2d Series. (Paper) 467, No. 3, 5/22/70 to date. (Many missing issues)

Perkins, Rolland M. *Cases and Materials on Criminal Law and Procedure*. 2d ed. Foundation Press, 1966.

Potts, James L. *Prisoners' Self Help Litigation Manual*. National Prison Project, 1976.

Prosser, William. *Handbook of the Law of Torts*. 4th ed. West, 1971.

Rudovsky, David. *The Rights of Prisoners*. Avon, 1977.

Shepard's Federal Citations.

Shepard's United States Citations.

Sokol, Ronald P. *Federal Habeas Corpus*. 2d ed. Michie, 1969.

Torcia, Charles E. *Wharton's Criminal Procedure*. 12th ed. 4v. 1976.

U.S. Code, 1970 ed. v. 1-11. Supp. IV, v. 1-3 and Index, 1974.

U.S. Code Annotated. West. 188v.

Library has entire set, but only Titles 18; 28 (Sec. 2241-2255); and 42 (Sec. 1981-1985) are being kept up-to-date.

U.S. Supreme Court Digest. West. c. 16, 1952 ONLY.

U.S. Supreme Court Digest, Lawyers Ed. B-W. 20v. in 29.

U.S. Supreme Court Reports, Lawyers Ed. v. 1-100, 1917-1956.

U.S. Supreme Court Reports, LE 2d. v. 1- , 1957-

U.S. Supreme Court Reports, LE 2d. Desk Book.

U.S. Supreme Court Reports, LE 2d. Index to annotations in LE 2d, and ALR Federal, etc. 1972.

U.S. Supreme Court Reports, LE 2d. Later Case Service. 1977.

Werner, O. James. *Manual for Prison Law Libraries.* Rothman, 1976.

Wright, Charles A. *Federal Practice and Procedure.* West, 1969- v. 1-16 and 21.

Krantz, Sheldon. *The Law of Corrections and Prisoners' Rights in a Nutshell.* West, 1976.

U.S. House of Representatives:

Rules of Criminal Procedure for the U.S. District Court. Oct. 1, 1977.

Rules of Civil Procedure for the U.S. District Court. Oct. 1, 1977.

Federal Rules of Appellate Procedure. January 1, 1976.

Federal Rules of Evidence. February 1, 1978.

The National Ex-Offender Assistance Directory 1978. Contact, Inc.

Federal Rules Decisions. v. 1 to date

New Mexico Materials

New Mexico Digest. West, 6v. in 14.

New Mexico Reports. v. 50- 1946-

New Mexico Statutes Annotated, 1953. 12v. in 20.

New Mexico Statutes Annotated. Special Supplement.
Chapter 14. *Municipal Code*, 1975.

New Mexico Appellate Handbook. Institute of Public Law & Services.

New Mexico Criminal Law Handbook. Institute of Public Law & Services.

New Mexico Local Rules and Federal Rules. Institute of Public Law & Services.

Roehl, Joseph E. *New Mexico Uniform Jury Instructions.* Civil. West, 1966.

Shepard's New Mexico Citations.

State Bar of New Mexico Bulletin.

Thompson, Mark B. *New Mexico Appellate Manual.* Institute of Public Law & Services.

Walden, Jerrold L. *Civil Procedure in New Mexico.* Institute of Public Services.

Federal Reporter, 2d Series

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Federal Reporter, 2d Series

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EXHIBIT II

I. Materials for both Federal and State Prisons

A. Federal Materials

1. *United States Code Annotated*. St. Paul:
West

or

United States Code Service (Lawyer's Edition). Rochester: Lawyers Cooperative.

2. *United States Reports*. Washington, D.C.:
U.S. Government Printing Office. Vol. 340-
1950-.

or

Supreme Court Reporter. St. Paul: West.
Vol. 71-, 1950-

or

*United States Supreme Court Reports
(Lawyers' Edition)*. Rochester: Lawyers
Cooperative. Vol. 95-, 1950-.

3. *Federal Reporter*. (2d Series). St. Paul:
West. Vol. 179-, 1950-.

4. *Federal Supplement*. St. Paul: West. Vol.
88-, 1950-.

5. *Modern Federal Practice Digest* and *West's
Fed. Digest 2nd*. St. Paul: West, 1960-.

6. *Shepard's United States Citations*. Colorado
Springs: Shepard, 1968-.

7. *Shepard's Federal Citations*. Colorado
Springs: Shepard, 1969-

8. Wright, Charles A. *Federal Practice and
Procedure*. St. Paul: West, 1969.

or

- Orfield, Lester B. *Criminal Procedure Under The Federal Rules*. Rochester, N.Y.: Lawyers Cooperative, 1966-68.

- 9. Sokol, Ronald P. *Federal Habeas Corpus*. (2d ed.) Charlottesville, N.C.: Michie, 1969.

B. General Materials

- 1. Black, Henry C. *Black's Law Dictionary*. (Rev. 4th ed.) St. Paul: West, 1968.

or

Ballentine, James A. *Ballentine's Law Dictionary*. Rochester, N.Y.: Lawyers Cooperative, 1969.

- 2. *Criminal Law Reporter*. Washington, D.C.: Bureau of National Affairs. Weekly. 2 vols. (looseleaf)

- 3. One or more of the following:

- a. Anderson, Ronald A. *Wharton's Criminal Law and Procedure*. Rochester, N.Y.: Lawyers Cooperative, 1957. (13th ed.)
- b. Israel, Jerold H. and Wayne R. LaFave, *Criminal Procedure in a Nutshell*. St. Paul: West, 1971.
- c. Perkins, Rollin M. *Criminal Law*. (3d ed.) Mineola, N.Y.: Foundation Press, 1966.
- d. LaFave, Wayne R. and Austin Scott, Jr. *Hornbook on Criminal Law*. St. Paul: West, 1972.
- e. Hall, Livingston, Yale Kamisar, Wayne LaFave and Jerold Israel. *Cases on*

Modern Criminal Procedure, (3rd ed.)
St. Paul: West.

4. Bailey, F. Lee and Henry Rothblatt. *Complete Manual of Criminal Forms, Federal and State*. Rochester, N.Y.: Lawyers Cooperative, 1968.
5. Cohen, Morris L. *Legal Research in a Nutshell*. (2d ed.) St. Paul: West, 1971.
6. Fox, Sanford J. *Juvenile Courts in a Nutshell*. St. Paul: West, 1971.
7. The following:
 - a. *Prison Law Monitor*, Institution Educational Services, 1806 T St., N.W. Washington, D.C. 20009
 - b. *Prisoners' Self-Help Litigation Manual*, Lexington Books, 125 Spring St., Lexington, Mass. 02173
 - c. *Rights of Prisoners*, ACLU, 22 East 40th St., N.Y., N.Y.
8. *Criminal Law Bulletin*. Boston: Warren, Gorham & Lamont. Monthly.

II. Additional Materials for State Prisons

1. Set of annotated statutes of State.
2. State session laws subsequent to coverage in annotated statutes and supplements, if not covered by legislative service of annotated statutes publisher.
3. Court reports of appellate courts of State, 1950-.
4. Digest of court decisions of State.
5. Shepard's citations for State.

6. Rules of State courts not covered in annotated statutes. Single volume edition preferred, if available; otherwise, free copies may be obtained from clerks of some courts.
7. State legal encyclopedia, if any.
8. One or more state practice books (with forms) on evidence, criminal law and procedure.

Note: All materials should be kept up to date by subscriptions or supplementation.

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW MEXICO

Civil Action No. 77-721-C

DWIGHT DURAN, *et al.*,
Plaintiffs,
vs.

JERRY APODACA, *et al.*,
Defendants.

ORDER

[Filed Dec. 7, 1979]

The parties to the above s[ty]led litigation have presented the Court with a Joint Request for Partial Consent Decree which would result in a settlement of the issues raised by the allegations in Paragraph 27 of the Amended Complaint insofar as it relates to visitation at the Penitentiary of New Mexico. The Court has considered the said Joint Request and the terms of the proposed settlement and has determined that the proposed Partial Consent Decree would be in the interest of justice to the parties and should be entered.

Wherefore, premises considered, the defendants, individually and in their official capacities, their agents, employees, successors in office and any other acting in

concert with them, are hereby enjoined from failing to implement fully and within the times prescribed each of the provisions of the attached Joint Request for Partial Consent Decree and the allegations of Paragraph 27 of the Amended Complaint insofar as it relates to visitation is dismissed from the trial of this case.

The Court retains jurisdiction to enforce this Order.

Done this 7th day of December, 1979.

/s/ Santiago E. Campos
SANTIAGO CAMPOS
United States District Court Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW MEXICO

Civil Action No. 77-721-C

DWIGHT DURAN, *et al.*,
Plaintiffs,
vs.

JERRY APODACA, *et al.*,
Defendants.

JOINT REQUEST FOR PARTIAL CONSENT
DECREE

[Filed Dec. 7, 1979]

Come now the parties in the above styled case and jointly request that the Court enter a partial consent decree in settlement of those allegations made in the Amended Complaint in paragraph 27 insofar as they *relate to visitation*. The provisions which the parties have agreed to and which this Court is asked to approve and adopt as its order are as follows:

- 1) The number of visitors an inmate may receive and the length of visits may be limited only by the institution's schedule and space and personnel requirements.
- 2) Inmates shall not be denied access to visitation with persons of their choice except where the Chief Executive

Officer or his/her designate can present clear and convincing evidence that such visitation jeopardizes the safety and security of the institution or the visitors.

3) No persons shall be denied permission to visit solely because of their sex, marital status, status as an ex-offender, the fact that they are or have been on another inmate's visiting list or because of the marital status of the inmate.

4) The following provisions limiting who may visit shall be deleted from the defendants' visiting regulations:

A) Ex-felons as visitors:

Persons with known felony convictions, persons with extensive criminal backgrounds, and former PNM inmates will ordinarily not be approved for visiting. Exceptions to this may be extended to immediate family members only, and only with the approval of the Classification Committee. Limited or full visiting privileges may be extended to the persons to be approved when they have shown stability in the community, as may be verified by the field services staff (Probation-Parole Officers), and it has been established that a meaningful relationship exists between the inmates and those persons.

B) Visitors who visit with more than one inmate:

1) Visitation with more than one (1) inmate will only be approved when the visitor(s) is/are immediate family member(s), as defined by paragraph 4b(4), above, or the legal spouse of an approved immediate family member.

2) A person who has been approved for visiting with any inmate will not be approved for visiting with another inmate not related to that visitor. "Related" herein will be defined as "Immediate Family" as defined in this policy statement. If a person has been approved

for visiting with an inmate who is subsequently transferred to any other institution or facility, that person is still ineligible for placement on another inmate's approved visiting list.

C) Common Law Relationships:

(Not to be misconstrued with establishment of common-law relationship for inter-prison visits). The approval of common-law relationships as a basis for visits will be contingent on such factors as the length of the relationship, mutual property holdings, children resulting from the relationship, etc. Visits will not be granted when both parties have lived together for less than one year.

D) Friends of the opposite sex:

Single inmates may have an unlimited number of persons of the opposite sex on his approved visitor list, within the limitations imposed by paragraph C), above. Married inmates may have friends and non-blood related relatives of the opposite sex on their visiting list, but only after the inmate's spouse has provided the Visiting Office with written consent for same.

E) Confirmation of marriage:

Anyone claiming to be the legal spouse of a resident incarcerated here must provide a valid marriage certificate; a marriage license is not sufficient unless it also includes a certification that the marriage did in fact take place. Either the marriage certificate or a photocopy may be presented, either by attaching it to the application questionnaire or in person to the Visiting Office when visiting at this facility. If the marriage certificate is presented in person, a photocopy will be made at no cost and the original immediately returned to the owner.

5) Investigations conducted by the defendants relating to visits shall be limited to:

A) Investigations, as required, of incidents involving correspondents and/or visitors which affect or potentially affect the security or orderly operation of PNM.

B) Investigations to verify personal data provided in response to questionnaires in cases in which there is reasonable cause to believe that the information provided is not accurate or complete.

6) Files maintained by the defendants on each visitor shall be limited to:

A) Records of the visitor's certification form (8A) and reports of significant incidents which indicate that visitation by this person will jeopardize the security of the institution and prior convictions of the persons authorized to visit prisoners at the PNM.

B) Files based on daily visiting records obtained from the Front Entrance.

7) Procedures for placement on approved visitor list:

A) The defendants shall issue each new commitment an A&O Visitor Request list form during the initial intake processing. Each resident must complete the form by providing the required information for each visitor being requested in accordance with the instructions provided on the reverse side of the form. The information requested on the form shall be the visitor's name, address, age and the visitor's relationship to the requesting inmate. The completed f[or]m will then be promptly forwarded to the Visiting Office. The forms in Spanish will be provided on request.

B) Residents returning as parole violators and those returning on subsequent sentences shall be required to submit a new A&O Visitor Request List. Prior authorizations for prisoners returning from other facilities such as on minimum security visiting lists will be reviewed upon transfer. A new list need not be submitted to resume visits.

C) The Visiting Office will send a questionnaire application form (Class. form 8A) to each person, regardless of age or relationship, that a resident requests to be authorized for visiting priv[i]leges. The questionnaire will be accompanied by a summary of the visiting regulations.

D) As a general rule, the parents, grandparents, siblings, legal wife, and children of residents and others with existing relationships as approved by the visiting officer will be granted 30-day temporary approval to visit, provided their individual names have appeared on the resident's A&O Visitor Request List. They must, however, complete and return the questionnaire application form (Class. form 8A) within the thirty day time period. Failure to do so will cause their temporary visiting authorization to be suspended until their questionnaire application is received, processed and approved by the Visiting Office. The fact that a person was previously granted a temporary visiting authorization does not necessarily mean they will be granted permanent visiting privileges. All other applicants, including other relatives, may not visit until their applications have been received, processed, and approved, and approval notices issued.

E) The defendants will review all questionnaires returned by applicants to insure completeness and validity of the information provided. Questionnaires not properly completed will be returned for correction, as necessary.

8) The following provisions shall govern the time and the number of hours per week prisoners will be permitted to visit:

A) Hours for social visiting are from 8:30 a.m. to 3:30 p.m. from Wednesday through Sunday, with no visiting normally on Mondays or Tuesdays, except when

they are designated as state holidays. The official visiting week is Wednesday-Sunday.

B) Due to present space and staff limitations, all inmates in the general population may normally visit for four (4) hours per week. Visits taking place on Saturday, Sunday or a state holiday may be limited to one two (2) hour weekly visit if allowing for the usual two separate two (2) hour weekly visits would result in some prisoners not being allowed to have visitation time on the weekend. Due to overcrowding in the visiting room visits may during peak visiting times be limited to one hour if allowing the usual two (2) hour visit would result in some prisoners with visitors waiting not be allowed to have visitation. Visitors may divide the four (4) hours of visits into two (2) separate weekly visits of no more than two (2) hours in duration.

C) Inmates in level #2, Segregation Unit—visitation for these prisoners shall be governed by a separate policy statement.

D) Inmates in level #3, long-term segregation—visitation for these prisoners shall be governed by a separate policy statement.

E) Inmates in CB #4, Protection status—visitation for these prisoners shall be governed by a separate policy statement.

F) Visiting on holidays will be counted as a regular visiting day. When a legal state holiday falls on either a Monday or a Tuesday, the visiting week will be Monday or Tuesday through Sunday.

G) Any extra visiting time must be recommended in writing, in advance, by the Casemanager with final approval by the Chief Classification Officer. Because of space limitations, extra visiting time on weekends and holidays should be discouraged. Under special circum-

stances, a visit may be longer in duration or occur at a time different from that described above, e.g., if a visitor must travel a long distance or is unable to visit on normal visiting days.

H) Visiting hours are not cumulative from week to week. Any portion of one hour of visiting time used will be charged as a full hour except when the visit is terminated by staff for some institutional function over which the inmate has no control, e.g., Parole Board appearances. In that case, the inmate will be entitled to the remainder of his visiting time, provided it can be accomplished in the same visiting week during which the interruption occurred.

I) Inmates officially assigned to the Annex or Cell Block #1, Honor Unit, are allotted four (4) hours visiting time on week days (Wednesday-Friday). This time may be divided into two (2) separate two (2) hour visits provided the time is used on week days. Visits of less than two (2) hour duration will count as a two (2) hour visit. An additional two (2) hours visiting time is allotted for weekends. Annex-assigned inmates may conduct weekday (i.e., Wednesday, Thursday, Friday) visits in the designated outside area. Visitors must register and undergo thorough security screening at the Front Entrance Building prior to reporting to the Annex to visit. All restrictions imposed upon regular social visits at the Main Institution as stipulated within the Policy Statement will be enforced.

9) Prisoners may have up to but no more than three visitors at one time because of space limitations. When more than three approved visitors wish to visit during the same period, they may alternate so that no more than three visitors are visiting at one during the regular visiting period. The number of visitors per inmate may be reduced without prior notice if overcrowding or other situations which pose a threat to the security of the institution, exist.

10) The following age limitations shall apply to visitors:

A) No visitors under the age of eighteen (18) years will be permitted to enter the Penitentiary for visiting purposes unless accompanied at all times by an adult approved for visiting the same inmate.

B) Brothers, sisters, children and grandchildren over the age of sixteen (16) may be approved for visiting privileges and may visit unaccompanied by an adult.

C) Children under 5 years of age will not be charged against the number of visitors (3) allowed to visit at one time. They must, however, be kept under reasonable control in both the visiting room and waiting areas. Nuisance created by children and/or adults will be sufficient reason to terminate a visit.

11) The following provisions shall govern the conduct of visits and searches of visitors:

A) It is a violation of state law for any person to introduce, or attempt to introduce, into the penitentiary any article of contraband including deadly, explosive materials, currency, weapons, ammunition, intoxicants or controlled substance. All visitors will be questioned by the defendants prior to their admittance into the fenced perimeter to determine whether they possess any of the above prohibited items. All persons entering the PNM will be required to pass through a metal detector.

B) Purses, briefcases, packages, etc., must be locked in the visitors' automobiles prior to entering the institution. Vehicles containing contraband other than weapons, alcohol, or drugs will be allowed to park in visitor's parking area after locking such items in trunk. Vehicles containing alcohol or drugs will be allowed to park in the visitors parking lot after disposing of the alcohol or drugs.

C) All packages and items carried into the institution are subject to search by PNM employees and/or state and county law-enforcement officials.

D) All visitors shall be informed prior to entering the institution that, upon reasonable cause, they may be subject to search and must sign a statement to that effect. If they choose not to enter, they will not be subjected to a search, and will be escorted from institutional grounds immediately. Where there exists a reasonable suspicion that a particular visitor is attempting to introduce contraband into the institution, the Chief Executive Officer on duty at the facility may order at any time that the visitor be subjected to a more thorough search. A visitor may be requested to remove his/her clothing to submit to a strip search only where the Chief Executive Officer of the PNM determines that there is probable cause to believe that the particular visitor possesses contraband. In such an instance the search may be conducted only by an employee of the PNM of the same sex as the visitor in an area that provides the visitor the greatest possible privacy.

E) Visitors and inmates may kiss and embrace at the beginning and at the end of each visiting period, but other physical displays of affection which are disruptive to the visiting environment will not be permitted. Inmates will be permitted to hold infant children during visits and may assist with feeding.

F) Written messages, after inspection and approval by visiting room officer, and photographs, may be exchanged during a visit. Visiting room tables are to be kept clear of all items, such as cigarettes, lighters, matches, wallets, etc.

G) Money may not be left for an inmate but may be mailed to the institution in the form of a cashier's check or money order from approved visitors.

12) The following rule will govern the search of prisoners having visits:

Inmates having visits at any time will submit to complete strip shakedowns before and after each visit.

The Lieutenant-in-charge will insure that each inmate is given a complete shakedown as indicated. The search will be conducted by a male employee of the PNM in an area which provides the greatest possible privacy to the inmate. Where there is a reasonable suspicion that the prisoner possesses contraband, the search may involve a visual inspection of the prisoner's body cavities (rectal and/or vaginal inspection) conducted by medical personnel. A prisoner may be subjected to a manual or instrument inspection of his body cavities only where there is probable cause to believe he is concealing contraband. Reasonable suspicion is not created by the mere fact of a contact visit. In such cases the search must be authorized by the Chief Executive Officer of the facility and conducted by a medically trained person.

13) Each resident may have up to a maximum of fifteen (15) approved visitors regardless of their relationship, providing they have been cleared by the Visiting Office. The Warden may authorize an increase in the list, under special circumstances such as in cases where the prisoner's immediate family exceeds fifteen (15).

14) Approval of persons on an inmate's visiting list while at any other correctional institution or facility will be reviewed upon the inmate's transfer back to the Penitentiary of New Mexico. The defendants will update the approved visiting list upon the inmate's return to PNM and will assure that policy has been followed and determine any change in circumstances.

15) Inter Prison visits:

A) Inter-prison visits will be allowed for members of the immediate family. Visiting time will not be charged against the inmate's allocated time for visiting.

B) Establishment of relationship:

1. If legally married, the Certificate of Marriage must be produced at the time of application for visiting privileges.

2. In the case of a common-law relationship, the applicant will provide evidence that they have cohabited for a period prior to incarceration, or a child or children resulted from their relationship. All materials are to become a permanent part of the central files of both inmates.

C) Restriction of Inter-prison visiting privileges:

1. If either inmate is at any time placed in disciplinary or segregation status, inter-prison visiting privileges for both inmates shall be immediately suspended and remain suspended until release of the disciplinary segregated inmate.

2. Any breach of rules while visiting, e.g., refusing to obey an order or creating a disturbance, may result in termination of visiting privileges.

3. A written memorandum will be forwarded to the Deputy Warden/Programs on any person denied, suspended or terminated from receiving visiting privileges at the Penitentiary of New Mexico. The report will include reasons for the denial, name of inmate and visitor involved, and employee approving suspension or termination of visiting privileges is delegated to the designated Duty Officer on weekends and holidays, and the Deputy Warden/Programs or his designee during normal working hours.

D) Inter-prison visits between immediate family members:

Inter-prison visiting between immediate family members may be approved if it is shown that immediate family ties exist between or among those requesting to visit with each other. Initial approval for these visits must be obtained from the Visiting Officer and the Classification Committee.

E) Visiting after release:

Inmates who have visited previously on this basis will be allowed to continue visiting after one of them has been released, provided there are no indications that visiting should be discontinued.

F) Conduct during inter-prison visits:

All visiting rules and regulations applicable to social visiting will also apply in this category of visiting.

16) Visits with members of the clergy:

Members of the clergy who wish to make one or more visits with an inmate on a professional basis must make a written request prior to the initial visit, to the Warden, a prompt response will be given. Such visiting will not be counted against the inmate's visiting hours. Any member of the clergy who wishes to visit regularly as a friend rather than in his official capacity must make application to be placed on the inmate's regular visiting list as a friend or relative, as appropriate.

17) Prison hospital visits:

The Hospital Administrator, in conjunction with the Visiting Officer, will determine whether a hospitalized inmate may have a visit and whether the visit should take place in the regular visiting room or in the hospital. If the visit is to be held in the hospital, the Deputy Warden/Programs must grant prior approval. If approved, the Superintendent of Correctional Security will provide officer escort for the visitor and officer supervision.

18) Special visits:

All special visits not covered in this policy statement, e.g., with prospective employers, law enforcement officers, etc. must be approved in advance, in writing, by the Deputy Warden/Programs, subject to review by the Warden.

Immediate family members who reside out of state and who seldom visit do not necessarily have to be placed on the regular visiting list; they may visit under this regulation.

19) Visitor identification:

All visitors sixteen (16) years of age and older must present bona fide identification bearing their photograph before being permitted to enter the Penitentiary.

20) Overcrowded visiting room:

The ranking shift supervisor or the Duty Officer may alleviate crowded conditions in the Visiting Room by abbreviating two-hour visits to one-hour visits, being careful to credit the concerned inmate with the time not used.

21) Visitors' register:

Each approved visitor must sign a register upon entering and exiting the institution.

22) Pursuant to this Partial Consent Decree the defendants agree to issue the attached policy statement. Modifications of the provisions of the policy statement not explicitly included in the provisions of the Consent Decree may be made by the defendants without the permission of the Court as necessary for the security and orderly operation of the PNM.

23) The provisions of this order shall become effective February 1, 1980.

Submitted by:

/s/ [Illegible]
For the Plaintiffs

/s/ [Illegible]
For the Defendants

CORRECTIONS DIVISION

POLICY: VISITING

1. *POLICY*: It is the policy of this Institution to provide an effective visiting program that will enhance rehabilitative efforts, establish a reasonable normalization of social relationships, and satisfies security requirements of this facility. Policy and Procedure is updated annually.
2. *PURPOSE*: To establish regulatory procedures and guidelines for administering the visiting program.
3. *GENERAL*:
 - a. Family ties and personal relationships are important factors in individual and group morale. Visits are part of the means for maintaining family ties and wholesome personal relationships with relatives and friends.
 - b. The supervision of visits will be handled in a manner to insure contribution to good public relations, develop the public's understanding of institutional programs, and assist in the positive development of individual treatment programs and planning.
 - c. The number of visitors an inmate may receive and the length of visits may be limited only by the institution's schedule and space and personnel requirements. Inmates shall not be denied access to visitation with persons of their choice except where the Chief Executive Officer or his/her designate can present clear and convincing evidence that such visitation jeopardizes the safety and security of the institution or the visitors.

4. VISITING OFFICE:

a. Responsibilities: The Visiting Office (V)) is designated as the office of primary responsibility for all matters relating to visiting and has the following specific duties:

- (1) To serve as the focal point for inquiries, assistance, and information.
- (2) To approve and disapprove applications in accordance with the procedures established herein.
- (3) To conduct investigations, as required, of incidents involving correspondents and/or visitors which affect or potentially affect the security or orderly operation of PNM.
- (4) To maintain records of the visitor's verification form (8A) and reports of significant incidents which indicate that visitation by this person will jeopardize the security of the institution and prior convictions of the persons authorized to visit prisoners at the PNM.
- (5) To inform the Front Entrance Officer and the Mail Room of persons authorized to visit residents in PNM, as well as any changes in their status.
- (6) To maintain files based on daily visiting records obtained from the Front Entrance.
- (7) To establish a secure area for the storage of investigative and intelligence information with access strictly limited, in accordance with applicable State and Federal laws, to:
 - (a) ~~The~~ Warden
 - (b) The Deputy Warden/Programs

- (c) The Superintendent of Correctional Security
 - (d) The Intelligence Officer
 - (e) The Chief of Classification and Programming
 - (f) Personnel assigned to the Visiting Office
- (8) To conduct investigations to verify personal data provided in response to questionnaires in cases in which there is reasonable cause to believe that the information provided is not accurate or complete.
 - (9) To work closely with the Intelligence Office on any matter affecting the security or orderly operation of the Penitentiary which involves correspondents or visitors.

b. *Procedures:*

- (1) The Identification Office shall issue each new commitment an A&O Visitor Request list form during the initial intake processing. Each resident must complete the form by providing the required information for each visitor being requested in accordance with the instructions provided on the reverse side of the form. The information requested on the form shall be the visitor's name, address, age and the visitor's relationship to the requesting inmate. The completed form will then be promptly forwarded to the Visiting Office. The forms in Spanish will be provided on request.
- (2) Residents returning as parole violators and those returning on subsequent sentences shall be required to submit a new A&O Visitor Request list. Prior authorizations for prisoners returning from other facilities such as on

minimum security visiting lists will be reviewed upon transfer. A new list need not be submitted to resume visits.

- (3) The Visiting Office will send a questionnaire application form (Class. form 8a) to each person, regardless of age or relationship, that a resident requests to be authorized for visiting privileges. The questionnaire will be accompanied by a summary of the visiting regulations informing visitors of procedures.
- (4) As a general rule, the parents, grandparents, siblings, legal wife, and children of residents and others with existing relationships as approved by the casemanager will be granted 30-day temporary approval to visit, provided their individual names have appeared on the resident's A&O Visitor Request List. They must, however, complete and return the questionnaire application form (Class. Form 8a) within the thirty day time period. Failure to do so will cause their temporary visiting authorization to be suspended until their questionnaire application is received, processed and approved by the Visiting Office. The fact that a person was previously granted a temporary visiting authorization does not necessarily mean they will be granted permanent visiting privileges. All other applicants, including other relatives, may not visit until their applications have been received, processed, and approved, and approval notices issued.
- (5) The Visitation Officer will review all questionnaires returned by applicants to insure completeness and validity of the information provided. Questionnaires not properly completed will be returned for correction, as necessary.

5. *BASIC POLICY*: The number of visitors an inmate may receive and the length of visits may be limited only by the institution's schedule and space and personnel requirements. Inmates shall not be denied access to visitation with persons of their choice except where the Chief Executive Officer or his/her designate can present clear and convincing evidence that such visitation jeopardizes the safety and security of the institution or the visitors. No persons shall be denied permission to visit solely because of their sex, marital status, status as an ex-offender, the fact that they are or have been on another inmate's visiting list or because of the marital status of the inmate.

a. *Hours*:

- (1) Hours for social visiting are from 8:30 a.m. to 3:30 p.m. from Wednesday through Sunday, with no visiting normally on Mondays or Tuesdays, except when they are designated as state holidays.

The official visiting week is Wednesday-Sunday.

- (2) Due to present space and staff limitations, all inmates in the general population may normally visit for four (4) hours per week. Visits taking place on Saturday, Sunday or a state holiday may be limited to one two (2) hour weekly visit if allowing for the usual two separate two (2) hour weekly visits would result in some prisoners not being allowed to have visitation time on the weekend. Due to overcrowding in the visiting room visits may during peak visiting times be limited to one hour if allowing the usual two (2) hour visit would result in some prisoners with visitors waiting not being allowed to have visitation. Visitors may divide the four (4) hours of visits into two (2) separate weekly visits of no more than two (2) hours in duration.

- (3) *Inmates in level #2, Segregation Unit*—visitation for these prisoners shall be governed by a separate policy statement.
- (4) *Inmates in level #3, long-term Segregation*—visitation for these prisoners shall be governed by a separate policy statement.
- (5) *Inmates in CB#4, Protection Status*—visitation for these prisoners shall be governed by a separate policy statement.
- (6) Visiting on holidays will be counted as a regular visiting day. When a legal state holiday falls on either a Monday or a Tuesday, the visiting week will be Monday or Tuesday through Sunday.
- (7) Any extra visiting time must be recommended in writing, in advance, by the Casemanager with final approval by the Chief Classification Officer. Because of space limitations, extra visiting time on weekends and holidays should be discouraged. Under special circumstances, a visit may be longer in duration or occur at a time different from that described above, e.g., if a visitor must travel a long distance or is unable to visit on normal visiting days.
- (8) Visiting hours are not cumulative from week to week. Any portion of one hour of visiting time used will be charged as a full hour except when the visit is terminated by staff for some institutional function over which the inmate has no control, e.g., Parole Board appearances. In that case, the inmate will be entitled to the remainder of his visiting time, provided it can be accomplished in the same visiting week during which the interruption occurred.
- (9) *Inmates officially assigned to the Annex or Cell Block #1, Honor Unit*, are allotted four

(4) hours visiting time on week days (Wednesday-Friday). This time may be divided into two (2) separate two (2) hour visits provided the time is used on week days. Visits of less than two (2) hour duration will count as a two (2) hour visit. An additional two (2) hours visiting time is allotted for weekends. Annex-assigned inmates may conduct weekday (i.e., Wednesday, Thursday, Friday) visits in the designated outside area. Visitors must register and undergo thorough security screening at the Front Entrance Building prior to reporting to the Annex to visit. All restrictions imposed upon regular social visits at the Main Institution as stipulated within the Policy Statement will be enforced.

b. *Number of Visitors:*

No more than three persons may visit an inmate at one time because of space limitations. When more than three approved visitors wish to visit during the same period, they may alternate so that no more than three visitors are visiting at one time during the regular visiting period. The number of visitors per inmate may be reduced without prior notice if overcrowding or other situations which pose a threat to the security of the institution, exist.

c. *Visitors (Underage):*

No visitors under the age of eighteen (18) years will be permitted to enter the Penitentiary for visiting purposes unless accompanied at all times by an adult approved for visiting the same inmate. Brothers, sisters, children and grandchildren over the age of sixteen

(16) may be approved for visiting privileges and may visit unaccompanied by an adult. Children under 5 years of age will not be charged against the number of visitors (3) allowed to visit at one time. They must, however, be kept under reasonable control in both the visiting room and waiting areas. Nuisance created by children and/or adults will be sufficient reason to terminate a visit.

d. *Conduct during Visiting:*

Visitors and inmates may kiss and embrace at the beginning and at the end of each visiting period, but other physical displays of affection which are disruptive to the visiting environment will not be permitted. Inmates will be permitted to hold infant children during visits and may assist with feeding.

e. *Visitors' Responsibilities:*

- (1) Purses, briefcases, packages, etc., must be locked in the visitors' automobiles prior to entering the institution. Vehicles containing contraband other than weapons, alcohol or drugs will be allowed to park in visitors' parking area after locking such items in trunk. Vehicles containing alcohol or drugs will be allowed to park in the visitors' parking area after disposing of the alcohol or drugs.
- (2) Written messages, after inspection and approval by visiting room officer, and photographs, may be exchanged during a visit. Visiting room tables are to be kept clear of all items, such as cigarettes, lighters, matches, wallets, etc.
- (3) Smoking is not permitted by either inmates or visitors in either the social visiting room or

special interview rooms. Smoking is permitted by visitors in the visitors' waiting areas.

- (4) The vending machines in the visitors' waiting room and front lobby area are for the use of visitors, but all items purchased must be consumed and/or disposed of prior to entering the visiting room.
- (5) Money may not be left for an inmate but may be mailed to the institution in the form of a cashier's check or money order from approved visitors.
- (6) It is a violation of state law for any person to introduce, or attempt to introduce, into the penitentiary any article of contraband including deadly, explosive materials, currency, weapons, ammunition, intoxicants or controlled substance. All visitors will be questioned by the Entrance Building Officer prior to their admittance into the fenced perimeter to determine whether they possess any of the above prohibited items. All persons entering the PNM will be required to pass through a metal detector.
- (7) All packages and items carried into the institution are subject to search by PNM employees and/or state and county law-enforcement officials.
- (8) All visitors shall be informed prior to entering the institution that, upon reasonable cause, they may be subject to search and must sign a statement to that effect. If they choose not to enter, they will not be subjected to a search, and will be escorted from institutional grounds immediately. Where there exists a reasonable suspicion that a particular visitor is attempt-

ing to introduce contraband into the institution, the Chief Executive Officer on duty at the facility may order at any time that the visitor be subjected to a more thorough search. A visitor may be requested to remove his/her clothing to submit to a strip search only where the Chief Executive Officer of the PNM determines that there is probable cause to believe that the particular visitor possesses contraband. In such an instance the search may be conducted only by an employee of the PNM of the same sex as the visitor in an area that provides the visitor the greatest possible privacy.

f. *Inmates' Responsibilities:*

Inmates having visits at any time will submit to complete strip shakedowns before and after each visit. The Lieutenant-in-charge will insure that each inmate is given a complete shakedown as indicated. The search will be conducted by a male employee of the PNM in an area which provides the greatest possible privacy to the inmate. Where there is reasonable suspicion that the prisoner possesses contraband, the search may involve a visual inspection of the prisoner's body cavities (rectal and/or vaginal inspection) conducted by medical personnel. A prisoner may be subjected to a manual or instrument inspection of his body cavities only where there is probable cause to believe he is concealing contraband. Reasonable suspicion is not created by the mere fact of a contact visit. In such cases the search must be authorized by the Chief Executive Officer of the facility and conducted by a medically trained person.

g. *Number of Approved Visitors Per Resident:*

Each resident may have up to a maximum of fifteen (15) approved visitors regardless of their relationship, providing they have been cleared by the Visiting Office. The Warden may authorize an increase in the list, under special circumstances such as in cases where the prisoner's immediate family exceeds fifteen (15).

h. *Validation of Inmates Returning from Another Facility:*

Approval of persons on an inmate's visiting list while at any other correctional institution or facility will be reviewed upon the inmate's transfer back to the Penitentiary of New Mexico. The Visiting Officer will update the approved visiting list upon the inmate's return to PNM and will assure that policy has been followed and determine any change in circumstances.

i. *Other Visits:*

Inter-prison Visits: (ANNEX)

(a) Inter-prison visits will be allowed for members of the immediate family. Visiting time will not be charged against the inmate's allocated time for visiting.

(b) *Establishment of Relationship:*

1. If legally married, the Certificate of Marriage must be produced at the time of application for visiting privileges.
2. In the case of a common-law relationship, the applicant will provide evi-

dence that they have cohabited for a period prior to incarceration, or a child or children resulted from their relationship. All materials are to become a permanent part of the central files of both inmates.

(c) *Restriction of Inter-Prison Visiting Privileges:*

1. If either inmate is at any time placed in disciplinary or segregation status, inter-prison visiting privileges for both inmates shall be immediately suspended and remain suspended until release of the disciplinary segregated inmate.
2. Any breach of rules while visiting, e.g., refusing to obey an order or creating a disturbance, may result in termination of visiting privileges.
3. A written memorandum will be forwarded to the Deputy Warden/Programs on any person denied, suspended or terminated from receiving visiting privileges at the Penitentiary of New Mexico. The report will include reasons for the denial, name of inmate and visitor involved, and employee approving suspension or termination of visiting privileges is delegated to the designated Duty Officer on weekends and holidays, and the Deputy Warden/Programs or his designee during normal working hours.

(d) *Inter-prison visits between immediate family members:*

Inter-prison visiting between immediate family members may be approved if it is shown that immediate family ties exist between or among those requesting to visit with each other. Initial approval for these visits must be obtained from the Visiting Officer and the Classification Committee.

(e) *Visiting after Release:*

Inmates who have visited previously on this basis will be allowed to continue visiting after one of them has been released, provided there are no indications that visiting should be discontinued.

(f) *Conduct During Inter-Prison Visits:*

All visiting rules and regulations applicable to social visiting will also apply in this category of visiting.

(2) *Visits with Members of the Clergy:*

Members of the clergy who wish to make one or more visits with an inmate on a professional basis must make a written request prior to the initial visit, to the Warden, a prompt response will be given. Such visiting will not be counted against the inmate's visiting hours. Any member of the clergy who wishes to visit regularly as a friend rather than in his official capacity must make application to be placed on the inmate's regular visiting list as a friend or relative, as appropriate.

(3) *Prison Hospital Visits:*

The Hospital Administrator, in conjunction with the Visiting Officer, will determine

whether a hospitalized inmate may have a visit and whether the visit should take place in the regular visiting room or in the hospital. If the visit is to be held in the hospital, the Deputy Warden/Programs must grant prior approval. If approved, the Superintendent of Correctional Security will provide officer escort for the visitor and officer supervision.

(4) *Special Visits:*

All special visits not covered in this policy statement, e.g., with prospective employers, law enforcement officers, etc. must be approved in advance, in writing, by the Deputy Warden/Programs, subject to review by the Warden.

Immediate family members who reside out of state and who seldom visit do not necessarily have to be placed on the regular visiting list; they may visit under this regulation.

j. *Visitor Identification:*

All visitors sixteen (16) years of age and older must present bona fide identification bearing their photograph before being permitted to enter the Penitentiary.

k. *Overcrowded Visiting Room:*

The ranking shift supervisor or the Duty Officer may alleviate crowded conditions in the Visiting Room by abbreviating two-hour visits to one-hour visits, being careful to credit the concerned inmate with the time not used.

l. *Visitors' Register:*

Each approved visitor must sign a register upon entering and exiting the institution.

6. *DUTY CASE MANAGER AND DUTY OFFICER ASSISTANCE:*

Whenever assistance is needed with visiting problems which might arise, the Visiting Officer and/or the assigned Case Manager will be contacted for help. During weekends and holidays, the Duty Case Manager will be contacted for assistance. If the Duty Case Manager cannot assist the officers in charge of visiting, he will contact the Staff Duty Officer for additional assistance and decision making. The Duty Case Manager will make frequent contact with the visiting officer during weekends and holidays.

7. *CIRCUMVENTING OF REGULATIONS:*

Any attempt to circumvent the regulations outlined in this policy statement may result in loss of visiting privileges and possible further action against the inmate and/or visitors pursuant to laws of the State of New Mexico and the Inmate Disciplinary Code (Corrections Division, State of New Mexico).

8. *INTERPRETATION AND CHANGES:*

Modifications of the provisions of this policy, not included in the consent decree, entered into in *Duran v. Apodaca, et al.*, may be made at any time, as necessary for the proper security and orderly operation of the institution.

M. Jerry Griffin, Warden

*POLICY STATEMENT**EXHIBIT A***SUBJECT: CLASSIFICATION**

1. The Intake and Classification Center (ICC) has the overall responsibility to classify, test and monitor all inmates committed to the Department of Corrections and to develop data for Department planning and budget.

2. The policies and procedures which govern the actions of the ICC will be written and, at least annually, reviewed. Relevant policies and procedures, including a description of criteria for programs and general classification will be made available to all inmates and employees as part of their orientation. The classification manual will contain all classification policies and procedures for implementing those policies. The manual will be made available to all staff and will be updated as needed, but at least annually.

3. Custody classification will be guided by rational, objective standards derived from behavioral criteria. Inmates will not be disqualified from any custody classification solely by virtue of arbitrary and rigid criteria such as detainers, consecutive sentences, etc. Classification will be based on an evaluation of the accumulation of identified, relevant and rational factors and standards. Methods of continuing validation of those factors and standards will be developed and implemented. No classification change shall be based solely on a finding of fact by the disciplinary committee of a disciplinary infraction, but all changes must be based upon a consideration of the inmate's entire record under the standards and criteria adopted pursuant to this agreement.

4. No inmate shall be classified under a more restrictive security designation than is required by legitimate security requirements.

5. No inmate shall be subjected to more restrictive conditions of confinement, including but not limited to

freedom of movement within the institution and out-of-cell time, than those justified by the inmate's security designation. However, the Department of Corrections will use its best efforts to insure that no inmate be housed for more than 30 days in facilities designed or designated to house persons under restrictions and/or security more secure or stringent than that determined to be needed for the inmate by the rational classification system. In the event that an inmate is housed for more than 30 days in such a facility, he/she will be housed under conditions of confinement within that institution which are substantially similar to those justified by the inmate's security designation.

6. Jobs, program assignments, housing and services will be distributed in a rational, fair and equitable manner.

7. Each inmate's educational, vocational, medical and psychological needs shall be identified and the needed programs shall be made available to inmates consistent with the provisions in *Duran v. Apodaca*.

8. Provision will be made for appropriate programs and services for inmates with special needs, e.g., inmates who are drug addicts, drug abusers, alcoholics, emotionally disturbed, mentally retarded, or who pose high risks or require special protection. Regular data will be collected and maintained on such populations and programs. Services will be adapted as needed.

9. During intake and classification, the inmate will be provided services and resources comparable to those available to the general population, including correspondence, visitation, recreation, social activities and religious services.

10. All classification decisions provided for in this agreement will be made by classification committees. Each institutional classification committee will consist of

three persons, including a member of the psychological staff, a member of the program staff and a representative of the correctional security staff. The ICC classification committee will be composed of appropriate professional staff.

11. Inmates will be allowed maximum involvement in the classification process, which will include an opportunity to know the reasons for their classification and an opportunity to respond in person. Inmates will be carefully screened upon their commitment to the Department and will be regularly evaluated thereafter. Inmates will participate in assessing their needs and in selecting programs to meet those needs. Classification decisions will not be based upon confidential information which inmates have no reasonable opportunity to rebut.

12. The classification (custody and program) of each inmate who is serving a sentence of less than five years will be reviewed at least every ninety (90) days. The classification of inmates serving sentences of five years or longer will be reviewed at least annually. Reviews will be based on behavioral observations and analysis over a reasonable time period. Rational criteria and procedures consistent with the other general principles in this agreement will be developed and implemented. Inmates will also be allowed to initiate reviews of their progress, status and programming.

13. Inmates may not be required to participate in programs with the exception of work assignments.

14. Interviews with inmates in the classification or reclassification process shall be conducted in places that afford privacy from other inmates or irrelevant staff.

15. The defendants, with assistance from qualified consultants from the National Institute of Corrections, will develop a draft plan within 45 days of the implementation of this policy statement to meet the terms of this policy statement. Said plan will include criteria

for classificaion and reclassification, including standards for the utilization of personality inventory testing, personnel, resources and equipment needed, and timetables for implementation of the plan within a reasonable period of time. The draft plan will be circulated to counsel for the parties who may make comments or objections within 10 days. Within 70 days of the signing of the date of implementation of this policy statement a final plan will be submitted to the Court and the parties and will be implemented by the defendants within the time limits established by the plan. If the Plaintiffs are not satisfied that the plan will bring the Defendants into compliance with this policy statement within a reasonable period of time, they may apply to the Court for further relief.

*POLICY STATEMENT**EXHIBIT B***SUBJECT: LIVING CONDITIONS**

1. No more than one prisoner will be housed in any cell or single occupancy room. However, if there is an emergency caused by a riot, fire, or other disaster making living units unusable, and no other reasonable option is available, two people may be housed in said cells or rooms for a period of short duration while arrangements are made for alternative housing.

2. Each cell or single occupancy room will have a floor area of at least sixty square feet, except cells which are presently in use at PNM at Santa Fe. Those cells may continue to be utilized if they meet the other provisions of this order; inmates will not be housed in said cells for more than 10 hours per day except those confined in disciplinary segregation and those classified as maximum security who are governed by the provisions of the maximum security classification standards and other orders in this case.

3. Each single cell or room will contain at least: A. Lavatory with hot and cold running water; B. Toilet flushable by the prisoner; C. Bunk; D. Desk; E. Chair or stool; F. A locker or other storage space; G. Natural light; H. Artificial lighting which is both occupant and centrally controlled and which is of at least 30 footcandles at 30 inches above the floor. In cells which do not currently have lighting which is occupant controlled, such lighting will be provided no later than the completion of the renovation authorized by Laws 1980, Chapter 24; I. Ventilation which circulates at least 10 cubic feet of fresh or purified air per minute with $\frac{1}{3}$ fresh outside air, and; J. Acoustics that ensure noise levels that do not interfere with normal human activities and are normally less than 65 decibels, A scale, (dBA) during the day and 45 dBA during sleeping hours; K. Adequate

heating to provide temperatures within a normal comfort range.

4. If dormitories or multiple occupancy rooms are utilized, they will provide a minimum of:

A. 60 square feet of living space per person, excluding shower and lavatory facilities and dayroom space.

B. Thirty footcandles of light at a level of 30" from the floor for reading purposes;

C. Ventilation which circulates at least 10 cubic feet of fresh or purified air per minute per person with $\frac{1}{3}$ fresh outside air;

D. Flush toilets and lavatories in the ratio of 1 to 8 inmates; however, this requirement will not apply to unrenovated dormitories so long as the existing toilets and lavatories are maintained in working order;

E. Shower facilities in the ratio of 1 to 15 minutes;

F. Hot and cold water with appropriate mixing devices in the showers and lavatories;

G. Mirrors over lavatories;

H. Sanitary type drinking fountain or single service drinking cups for each dormitory and cellblock;

I. Personal lockers and/or other adequate space for personal belongings;

J. Noise levels normally no more than 65 decibels, A scale (dBA) during the day and 45 dBA during sleeping hours;

K. Ready access during non-sleeping hours to desks, tables, and/or other furniture suitable for use in reading and writing;

L. Adequate heating to provide temperatures within a normal comfort range;

M. There will be no double-bunking in dormitories.

5. Every prisoner will be provided with a sanitary mattress and at least two sheets, two blankets, a pillow and pillow case. Linen will be exchanged at least weekly and blankets, pillows and mattresses will be cleaned on a routine basis and maintained in a sanitary condition. Mattresses or mattress covers will be sanitized before reissue.
6. All prisoners will be provided clothing that is properly fitted, climatically suitable, durable, economical, easily laundered and repaired, and presentable. Said clothing will include outergarments, undergarments, and shoes.
7. Prisoners will be provided sufficient clean clothes to be able to change underwear and socks daily and other clothes at least 3 times per week except for coats, jackets and shoes. Additional clothes must be provided for work and recreation.
8. Each prisoner will be provided with adequate amounts of necessary personal hygiene items, cigarettes and/or tobacco and two clean towels which are exchanged at least twice a week.
9. Each prisoner will be allowed to shower daily, except those in maximum security housing units.
10. Measures will be taken by the Department of Corrections to provide maximum access to and utilization of the currently available activity space. Adequate equipment for a variety of leisure time activities will be provided.
11. The Secretary of Corrections will continuously maintain accurate data as to the maximum number of prisoners who can be housed at PNM pursuant to the provisions of *Duran v. Apodaca*. The allowable maximum number of prisoners will not be exceeded at PNM.
12. A written routine daily housekeeping plan will be executed which includes at least the following: (a) the

areas to be cleaned and procedure for cleaning said areas; (b) the frequency of cleaning each area; (c) the specific person or persons assigned to supervise the cleaning of each area; (d) the procedure for procurement and maintenance of housekeeping equipment and supplies.

13. A qualified person, familiar with health and safety standards and practices, will oversee health and sanitation conditions at PNM.

14. Cleaning activities will be supervised at all times by particular assigned civilian staff.

15. A written checklist will be utilized for a daily inspection to be done of all areas by a specific employee to assure that all areas are clean and sanitary. The employee will sign the document certifying that he/she conducted the inspection and that the report is accurate.

16. (a) Screens will be maintained on all windows and doors; (b) window panes will be continually maintained in all areas; (c) structural defects which allow rodents to enter the buildings will be cured; (d) an effective vermin and pest control program will be implemented.

17. A comprehensive written preventive maintenance manual will be prepared and utilized which includes an inventory of all equipment and systems at PNM along with a schedule for regular inspection and maintenance of said equipment and systems which include the maintenance requirements of the manufacturer's specifications. The manual will specifically state the employees responsible for executing the plan and specific measures to be taken in maintaining each machine or system. Those persons will be adequately trained for said duties.

18. A checklist will be developed for the inspection and maintenance of each machine or system and the person responsible for inspection and maintenance will certify that the facts stated on the checklist are true.

19. An adequate inventory of parts regularly needed will be maintained to prevent unnecessary delays in major repairs.

20. A comprehensive fire safety plan will be prepared and executed for the Penitentiary of New Mexico which includes: (a) specific provisions for adequate fire protection service; (b) the specific equipment such as fire extinguishers and fire hoses to be located at specific appropriate places within the institution and inspection and preventive maintenance schedules for said equipment; (c) the specific responsibilities of staff and prisoners in the event of a fire, and; (d) the training to be given staff and prisoners in fire safety. This plan will be certified by the state fire marshal or another qualified authority as adequately providing for the safety of the prisoners at PNM.

21. PNM will have available to it on a regular basis a qualified fire safety officer to ensure that the institution meets fire safety and prevention standards including those provided by the Life Safety Code (1976, National Fire Protection Association Document No. 101 or any superseding standards promulgated by that association). Said person will have a minimum of three years experience in fire prevention and safety work.

22. The institution will be inspected at least twice a year by the State fire marshal or other qualified fire safety expert. If the facility in any way does not meet state fire safety standards or the standards of the Life Safety Code, curative actions will be immediately taken.

23. The institution has a written evacuation plan prepared in the event of fire or major emergency which is certified by an independent inspector trained in the application of the Life Safety Code. (current edition). The plan is reviewed annually, updated if necessary, and re-issued to the local fire jurisdiction. The plan includes:

- a. location of building/room floor plans;
- b. use of exit signs and directional arrows for traffic flow;
- c. location of publically posted plan;
- d. at least quarterly drills for all inmates and staff, except that drills may be limited to staff when evacuation of extremely dangerous inmates would be involved. In such cases, the inmates will be fully instructed as to all aspects of the evacuation plan.

24. Any exposed electrical wire and water leakage problems will be forthwith cured. In addition, PNM will meet the standards required by state and local law and the Underwriters Electrical Code.

25. Mattresses and trash containers will be made of materials which meet fire safety standards.

26. No cross-connections will exist between the potable and non-potable water systems.

27. All applicable State of New Mexico plumbing standards and/or regulations will be adhered to.

28. All prison industries will comply with all Occupational Health and Safety Administration (OSHA) or superseding New Mexico standards and will be inspected at least yearly.

29. Strip cells shall not be used for the housing, discipline, or detention of prisoners. -

30. In addition to the above, no later than the completion of the renovation authorized by Chapter 24, Laws 1980, the Penitentiary of New Mexico at Santa Fe will meet applicable national standards as to living conditions for inmates.

POLICY STATEMENT

EXHIBIT C

SUBJECT: INMATE ACTIVITY

General Purpose:

One part of the statutory mandate to the Department of Corrections and Criminal Rehabilitation is to "try to rehabilitate" offenders committed to its custody and care. This statutory mandate will be implemented through the following policies and procedures:

1. After classification, a comprehensive program will be designed for each inmate. The program will include an appropriate housing assignment and provision for medical and mental health needs. The program will also include, consistent with orders or policy statements in the *Duran* case, vocational training, educational programs, work programs, and any special problem needs.

2. The inmate's progress in his or her program will be monitored by the intake and classification center and the institutional classification committee.

3. Programs will be linked to community resources if possible.

4. Vocational and educational testing will be provided to all newly committed inmates and as necessary during the inmates' imprisonment. Vocational and educational counseling will be coordinated with the testing.

5. All inmates classified as needing and desiring some type of education will be provided an appropriate educational program. The institutional educational program shall be comparable to that in the public school system in New Mexico in quality, staff, supplies, equipment, institutional materials and programs including special and bilingual educational programs. Staff will be provided in quantity and expertise to insure access by all inmates classified to educational programming. Educational and vocational programming will be available on a year

round basis. However, the adoption of this policy statement does not entitle inmates covered by it to rights under state or federal education or education financing laws and/or regulations to which they would not otherwise be statutorily entitled .

6. The Corrections Department will maintain a certificated, comprehensive, and continuous educational program for inmates that extends through high school level. Counseling to inmates will be provided under the supervision of the ICC initially upon their commitment to the Department of Corrections and periodically to insure proper program placement.

7. If the ICC evaluation indicates that vocational programming is appropriate, an opportunity to participate in such programming will be provided. Vocational and educational programming will be designed to develop marketable skills. All inmates determined by classification as needing some type of vocational or pre-vocational training and indicating interest in such training will be given the opportunity to participate in training. To qualify as a full time vocational or pre-vocational program, the program must meet for a minimum of 4 hours a day, 5 days a week except for recognized holidays and vacations. Inmates participating in a vocational or pre-vocational program on less than a full time basis shall have the opportunity to participate in other programs or be employed in a job for the remainder of the day. The provisions of this section shall be implemented as soon as possible, but no later than July 1, 1981.

8. Inmates will not be excluded from access to programming based on race, religion, nationality, sex or political belief.

9. Inmates working as teachers' assistants or para-professionals need not be licensed by the State of New Mexico but shall receive training and supervision from appropriate persons.

10. To qualify as a full time educational program for an inmate, other than college, the program must meet for a minimum of 4 hours a day, 5 days a week. Inmates participating in the educational program on less than a full time basis shall have the opportunity to participate in other programs or be employed in a job for the remainder of the day.

11. Inmates who are qualified shall have a reasonable opportunity to participate in an appropriate college or college extension program when such programs are reasonably accessible.

12. Recreational programming will be supervised by a full time, qualified recreation director. The director, in coordination with other institutional staff and community resources, will implement a comprehensive recreational program including leisure time and athletic activities. An appropriately qualified person designated by the warden will develop and implement comprehensive social programs and activities for all segments of the inmate population.

13. Inmates will be provided access to a minimum of one hour per day exercise and access to recreational opportunities including, when weather permits, outdoor exercise.

14. The inmate work program will provide the opportunity for full time employment to all inmates excluding those in full time educational or vocational programs or those in maximum security status or disciplinary segregation. Jobs will include prison industries, vocational training and institutional assignments. A job or assignment shall be considered full time if it provides for no less than 5 hours work per day, 5 days per week.

15. Prior to release or discharge, all inmates will enroll in a program to prepare them for their re-entry into society within statutory limitations. Pre-release programming will combine lectures with family and individual counseling, and survival skills training. Institutional

staff and community volunteers will be used as appropriate.

16. The Department will make good faith efforts to provide work and school release, pre-release and other community based programming and/or housing for inmates appropriately identified by the classification process.

17. All inmates will be provided with at least 8 hours a day of meaningful activity except those in disciplinary segregation and those classified as maximum security who are governed by the terms of the policy statement on maximum security.

18. The parties recognize that the requirements of this policy statement cannot be met at the present time. The Department of Corrections will act in good faith to utilize staff, facilities and services to meet those requirements. Further, as soon as practicable, a comprehensive plan with timetables will be produced by the National Institute of Corrections in coordination with the Department of Corrections to come into total compliance with the provisions of this policy statement. Said plan will be filed with the Court. The recommendations of said plan will be executed unless the Department can show cause why compliance would not be in the best interest of meeting the principles of this policy statement. If the Plaintiffs consider the plan or the timetable to be inadequate, they may request further relief from the Court.

19. The provisions of the policy statement relating to inmate activity are not applicable to prisoners confined in disciplinary segregation.

20. Inmates may refuse to participate in institutional programs except work assignments.

21. At the completion of the current renovation, indoor dayroom or leisure activity space of no less than 35 sq. ft. per inmate will be provided to all inmates.

POLICY STATEMENT

EXHIBIT D

SUBJECT: MEDICAL CARE

1. All inmates shall be provided with adequate medical and dental services needed to maintain basic health.

2 The medical care delivery system will be under the supervision of a full time licensed medical doctor who is normally on-site at the Penitentiary of New Mexico at Santa Fe at least forty hours per week. The doctor will report to an appropriate designee of the Secretary of the Department of Corrections in the central office.

3. A licensed medical doctor will be on-call 24 hours a day. In addition, substitute coverage by a licensed medical doctor will be provided for those times during which the regular on-site doctor is not available (e.g., vacation time). Written contracts, as appropriate, will be entered with those persons performing these duties.

4. In addition, written contracts will be entered into for the provision of medical specialists to provide any and all necessary specialty consultation or services either on-site or in outside facilities. Such arrangements will include, but not be limited to, a general surgeon; an ear, nose and throat specialist; an orthopedic surgeon and a general internist. An obstetrician and gynecologist will be added if women are housed in the facility. Specialty consultation and reports shall be on specific consultation forms which shall be included in the medical record. Specialty services must be provided in a timely manner as prescribed by the medical staff.

5. At a minimum, the present staff complement of four licensed physician's assistants and three infirmary technicians or equivalent personnel will be maintained.

6. There will be personnel on each shift with basic training in first aid and basic life support cardiopulmonary resuscitation who are continually within voice

contact range of all inmates in living or operational units.

7. Adequate medical equipment and supplies will be provided for medical care delivered at the facility.

8. On or before September 1, 1980, the on-site medical doctor at the Penitentiary of New Mexico at Santa Fe will produce a written evaluation of the personnel, facilities and equipment necessary to provide adequate medical care to the inmates. All such personnel, facilities and equipment will be promptly provided unless the Defendants show cause to this Court why they should not. Copies will be provided to counsel for the Plaintiffs who may apply for relief from this Court if the plan is deemed inadequate or if the plan is not executed within a reasonable time.

9. Entrance examinations which at least meet the requirements of Exhibit A of this policy statement will be provided all prisoners committed to the custody of the Department of Corrections. Screenings and evaluations will be conducted by a licensed physician or an appropriately trained medical staff member under the close supervision of a licensed physician. A licensed physician will review within seven days the file of each inmate who was examined by a physician's assistant.

10. At the time of entry to the prison, each inmate will receive written and verbal instructions explaining the procedures for gaining access to medical and dental care. Such instructions may be incorporated into the Inmate Handbook. Medical care services and dental care services will be fully available to all inmates regardless of custody status or other factors.

11. At the Penitentiary of New Mexico at Santa Fe or at any facility which houses more than 250 inmates, sick call will be conducted by a licensed physician or an appropriately trained physician's assistant on a daily basis. Inmates who request to be seen by the doctor or

physician's assistant will be seen as soon as is practical and/or necessary. Appropriate examination rooms which guarantee privacy will be provided and utilized for interviews and examinations.

12. There will be a licensed physician or physician's assistant on duty at the Penitentiary of New Mexico at Santa Fe 24 hours a day. If at any time during the day or night an inmate states to any member of the staff that he/she is sick or injured and is in need of care or if any member of the staff receives information to that effect, the staff member will promptly notify the designated physician, medical technician, or physician's assistant who will promptly provide appropriate care. All such requests and the actions taken will be recorded and maintained in a medical log and the medical file of the inmate. If information that an inmate may be sick or injured and in need of medical care is transmitted to the designated physician, medical technician, or physician's assistant and the inmate is not promptly examined, the reasons therefor will be noted in the log and the inmate's medical file.

13. Physical and dental examinations of every inmate will be conducted by a licensed physician or dentist at least once every two years.

14. As soon as possible after July 1, 1980, the Department of Corrections will have a full-time licensed dentist who will be in charge of dental care for the entire system. The dentist's primary duty will be dental care for the inmates at the Penitentiary of New Mexico at Santa Fe. Adequate dental facilities, equipment and support staff will be provided. Written agreements will be made with dental surgeons and other specialists to provide necessary services which cannot be provided by the dental staff at the facility.

15. On or before September 1, 1980, a licensed dentist with experience in full-time dental care delivery in pris-

ons will produce a written evaluation of the personnel, facilities and equipment necessary to provide adequate dental care to the inmates. Copies will be provided to counsel for the Plaintiffs who may apply for relief from the Court if the plan is inadequate or if the equipment is not purchased within a reasonable time.

16. There will be 24-hour emergency medical and dental care availability as outlined in a written plan which includes arrangements for: emergency evacuation of the inmate from the facility; use of an emergency medical vehicle; use of one or more designated hospital emergency rooms or other appropriate health facilities; and security procedures providing for the immediate transfer of inmates when appropriate.

17. Eyeglasses, dentures and other usual prosthetic devices will be provided to those prisoners who need them as soon as is practicable.

18. Physical therapy will be provided by appropriately trained persons to those inmates deemed by the physician to need such care.

19. Detoxification from alcohol, opioids, stimulants and sedative hypnotic drugs will occur under the care and supervision of the licensed physician.

20. Individual treatment plans will be developed by a physician for persons identified as chemically dependent. Those plans will be promptly carried out by appropriate personnel.

21. Inmates who need health care beyond the medical resources available at the penitentiary, as determined by the responsible health authority, will be transferred to a facility where such care is available. Adequate transportation vehicles and staff will be made available so that said needed health care will not be delayed.

22. The use of physical restraints for medical or psychiatric purposes will only be done pursuant to a written

policy and defined procedure under the direct supervision and control of a physician. Handcuffs will not be used for restraint in such cases. Only those methods of restraint which are appropriate to the general population will be allowed. When restraints are used, they will only be used for the shortest period of time necessary and the use, type of restraint, length of use and reason therefor will be fully documented in a medical log and the inmate medical file. Any person in such restraints will be monitored at least every thirty minutes.

23. No inmate will be deprived of rights or normally given privileges or be punished because of the request for or receiving of medical or dental care except where a limitation of activity is a necessary part of the prescribed medical or dental care.

24. Special therapeutic diets will be prepared and served to those inmates who need them as determined by the physician.

25. All drugs and narcotics will be prescribed and administered pursuant to state and federal laws. Psychotropic medications will be prescribed and monitored by a licensed psychiatrist pursuant to the standards of the American Psychiatric Association. All psychotropic medications and prescription drugs subject to abuse by inmates will be distributed by physicians and physician's assistants under the unidose system.

26. A "problem-oriented medical records" structure will be utilized which will include:

The completed receiving screening form;

Health appraisal data forms;

All findings (negative as well as positive, when pertinent), diagnoses, treatments, dispositions;

Prescribed medications and their administrations;

Laboratory, x-ray and diagnostic studies;

Signature and title of documentor;
 Consent and refusal forms;
 Release of information forms;
 Place, date and time of health encounters;
 Health service reports, e.g., dental, mental health
 and consultations;
 Treatment plan, including nursing care plan;
 Progress reports; and
 Discharge summary of hospitalization and other termination summaries.

27. The medical files will be separate from the confinement record and the medical files will be secured under the principle of doctor-patient confidentiality.

28. Adequate clerical assistance will be provided to the medical staff to carry out the terms of this order.

29. Inmates will not be utilized in the health care delivery system except for assignments which are essentially janitorial in nature.

30. Except in emergency situations which immediately threaten the life or health and in which the inmate is unable to give informed consent, informed consent will be received in writing and with a witness prior to surgical and non-routine treatments and examinations. Verbal informed consent will be received prior to other examinations, treatments or medical procedures. Informed consent requires that the inmate receives the material facts regarding the nature, consequences, risks and alternatives concerning the proposed treatment, examination or procedure.

31. In addition to the above, women prisoners will during the initial health assessment receive the following:

1. Inquiry about:
 - a. The menstrual cycle and unusual bleeding;

- b. The current use of contraceptive medications;
 - c. The presence of an I.U.D.;
 - d. Breast masses and nipple discharge;
 - e. Pregnancy.
2. The physical assessment shall include:
- a. A pelvic examination which must be conducted with the maximum concern for human dignity and which must not be subverted for security purposes;
 - b. A breast examination.
3. Specimens collected shall include a culture for gonorrhea, an appropriate test for cancer and a serological test for syphilis.
4. Provision shall be made for the special dietary and housing needs of pregnant women, and the continuation of contraceptives for therapeutic reasons. Women classified into community programs shall be offered family planning services.
32. In addition to the health care provided all inmates, women inmates shall receive the following care:
- a. Particular health problems of women, such as menstrual irregularities, shall receive appropriate gynecological care. Feminine hygiene items will be supplied. Douching will be made available and will be accompanied by proper education and precautionary advice.
 - b. A pregnant inmate will have the equivalent medical care as she would have were she not incarcerated.
 - c. Health maintenance procedures shall be established including, but not limited to, an appropriate test for cancer, venereal disease screening, breast examinations, etc.

EXHIBIT A

1. Receiving screening will be performed by trained staff on all inmates (excluding intra-system transfers) upon arrival at the facility with the findings recorded on a printed screening form approved by the health authority. The screening includes at least:

Inquiry into:

Current illness and health problems, including venereal diseases and other infectious diseases, and those health problems specific to women;

Medications taken and special health requirements;

Use of alcohol and other drugs which includes types of drugs used, mode of use, amounts used, frequency used, date or time of last use, and a history of problems which may have occurred after ceasing use (e.g., convulsions);

Past and present treatment or hospitalization for mental disturbance or attempted suicide;

Identification will also be made of those persons who need immediate care for serious and urgent mental health problems, such as overt psychosis, severe depression, or suicidal ideation;

Other health problems designated by the responsible health authority official.

Observation of:

Behavior, which includes state of consciousness, mental status, appearance, conduct, tremor and sweating;

Body deformities, ease of movement, etc.;

Condition of skin, including trauma markings, bruises, lesions, jaundice, rashes and infestations, and needle marks or other indications of drug abuse.

2. Medical screening will be performed immediately upon arrival at the institution for all intra-system transfers which includes, at a minimum:

Inquiry into:

Whether the inmate is being treated for a medical problem;

Whether the inmate is presently on medication;

Whether the inmate has a current medical complaint;

Observation of:

General appearance and behavior;

Physical deform[ities], evidence of abuse and/or trauma;

3. Health appraisal for each inmate (excluding intra-system transfers) will be completed within 14 days after arrival at the facility. In the case of an inmate who had documented evidence of a health appraisal within the previous 90 days, a new health appraisal is not required except as determined by the designated health authority. Health appraisal includes:

Review of the earlier receiving screening:

Collection of additional data to complete the medical, dental, mental health and immunization histories;

Laboratory and/or diagnostic test results to detect communicable disease, including venereal disease and tuberculosis;

Recording of height, weight, pulse, blood pressure and temperature;

Other tests and examinations as appropriate;

Examination including review of mental and dental status;

Review of the results of the examination, tests, and identification of problems by the appropriate health authority officials.

Initiation of therapy when appropriate, and

Development and implementation of treatment plan including recommendations, where medically appropriate concerning housing, job assignment, and program participation.

4. The collection and recording of health appraisal data will be consistent with the following:

The process is completed in a uniform manner as determined by the health authority;

Health history and vital signs are collected by qualified health personnel; and

Collection of all other health appraisal data is performed only by qualified health personnel.

5. The program of dental care for all inmates will consist of:

Dental care provided by a dentist licensed in the state;

Dental screening and written or verbal instructions on hygiene within 14 days of admission;

Dental examinations, supported by x-rays, based on information from the screening and performed within 30 days after arrival at permanent facility;

Treatment in accordance with a treatment plan not limited to extractions that is considered appropriate for the needs of the individual as determined by the institutional dentist; and

Consultation with referral to recognized specialists in dentistry.

POLICY STATEMENT

EXHIBIT E

SUBJECT: MENTAL HEALTH CARE

1. All inmates who, by reason of mental illness or mental retardation, require special housing and/or programs, will be identified and arrangements will be made for such housing and/or programs.
 2. All inmate members of the Plaintiff class who are in need of mental health care, as determined by a qualified practitioner, will be identified and the needed care and/or treatment programs will be provided when needed. Services will be available to those who need them in a context of varied modalities which will include, but not be limited to: Crisis intervention; brief and extended evaluation/assessment; short-term therapy (group and individual); long-term therapy (group and individual); therapy with family and significant others; counseling; medication; detoxification; and drug and alcohol counseling.
 3. In order to aid in compliance with the principles of Paragraphs 1 and 2 above, arrangements will be made to procure within 60 days from the date of adoption of this policy statement a written comprehensive evaluation of the personnel, facility and programmatic needs of the Penitentiary of New Mexico by a person or persons trained and skilled in the area of mental health care delivery in prisons. The evaluation will contain recommendations for the implementation of the terms of this policy statement. Said person or persons will include at least one licensed psychiatrist who will be jointly agreed upon by the parties.
- The written evaluation will be provided to the Department of Corrections and counsel for the plaintiffs. Within 30 days of the receipt of said document, the Department of Corrections will prepare a comprehensive plan with reasonable timetables to comply with the rec-

ommendations of the report. Said plan will be presented to counsel for the plaintiffs and filed with the Court.

The Department of Corrections will comply with the recommendations in the report unless it can show cause to the Court why compliance would not be in the best interest of meeting the principles of Paragraphs 1 and 2 above.

If the plaintiffs are not persuaded that the plan will meet the requirements of Paragraphs 1 and 2 within a reasonable time, they may petition the Court for further relief.

4. Good faith efforts will begin immediately to hire a licensed and otherwise qualified psychiatrist to be employed at the Penitentiary of New Mexico to provide needed psychiatric care and to be responsible for the mental health delivery system at the Penitentiary and the Department of Corrections' system. Until that time, contract psychiatric services will be provided on-site sufficient to meet the psychiatric needs of the population, including the prescription and monitoring of psychotropic medications, according to the principles of the American Psychiatric Association and accepted modern practice in the general community.

5. Inmates who need immediate care for serious and urgent mental health problems, such as overt psychosis, severe depression, or suicidal ideation will be screened and evaluated by a licensed psychiatrist, a qualified psychologist, or other qualified practitioner of medicine. Immediate and appropriate mental health care will be provided to such inmates.

6. All newly committed inmates will be given a routine mental health appraisal by mental health staff within 30 days of admission. Such evaluations are brief and include at least:

Group or individual interviews;

Behavioral observation;

A records review;

Group assessment to screen for emotional and/or intellectual abnormalities;

A written report of the findings;

Referral, by said mental health staff where appropriate, for a comprehensive individual mental health evaluation.

The comprehensive individual mental health evaluation on specially referred inmates will be completed within 14 days after the date of referral and include at least:

Review of mental health screening and appraisal data;

Collection and review of additional data from staff observation, individual diagnostic interviews and tests assessing intellect and coping abilities;

Compilation of individual's mental health history; and

Development of an overall treatment/management plan with appropriate referral.

7. All mental health services will be provided by mental health professionals who meet education and licensure/certification criteria specified by their respective professional disciplines (i.e., psychiatrists, psychologists, psychiatric nurses, social workers). All such persons will be limited in their functioning to their demonstrated areas of professional competence.

8. If mental health services staff believe some psychotropic medication program is needed, they will refer the inmate to the psychiatrist for evaluation, diagnosis, prescription and monitoring.

9. Written policies and job descriptions will be produced which comprehensively define the duties and limi-

tations of the entire mental health services program and each member of that staff.

10. Inmates will not be utilized in any way in the mental health care delivery system except for assignments which are essentially janitorial in nature.

11. Upon commitment to the Department of Corrections, all inmates will be informed verbally and in writing of the mental health care services available and how to request mental health assistance. The inmate handbook will also include that information. The information will be conveyed in a language which can be understood by the inmate.

12. All correctional officers will have training in basic mental health screening, including the recognition of symptoms of mental disturbances most common to the inmate population.

13. If at any time during the day or night an inmate states to any members of the staff that he/she is in need of mental health care or services or if any member of the staff receives information that such care or services are needed, the staff member will promptly notify an appropriately designated professional of the mental health staff who will promptly take all necessary action to provide any needed examination and services. All such requests and the actions taken will be recorded and maintained in a mental health log and the inmate's mental health file. The mental health file may be included in the medical file. If no action is taken, the reason therefore will be similarly recorded.

14. A written treatment plan which specifies the particular course of therapy and the roles of all personnel in carrying out the plan will be prepared by a psychiatrist or a qualified clinical psychologist for each inmate requiring mental health services. Similarly, a specific

psychiatrist or qualified clinical psychologist will be responsible for monitoring the plan and assuring that it is being appropriately executed.

15. Members of the mental health staff and their agents or people working in concert with them will be bound by professional standards of psychiatrists and psychologists in the community as well as state law and may not divulge information gained from inmates except as is consistent with such standards and laws. Those standards will be enunciated in particular as a part of the plan provided by paragraph 3 above. Records of the mental health staff will not be available to other institutional staff or inmates.

16. Members of the mental health staff will only make recommendations about an inmate to the parole board, the Governor concerning executive clemency requests, the classification committee or the disciplinary committee consistent with standards of psychiatrists and psychologists in the community as well as state law and may not divulge information gained from inmates except as is consistent with such standards and laws. Those standards will be enunciated in particular as a part of the plan provided by paragraph 3 above.

17. Upon commitment to the Department of Corrections, inmates will be informed as to the policy concerning mental health patient confidentiality.

18. Psychological test protocols and other "raw data" will not be available to anyone but qualified mental health professionals on the mental health staff or consulting staff. "Raw data" is test information not accompanied by interpretive statements made in a report by qualified mental health professionals. Computer generated statements are considered raw data. "Qualified mental health professionals" in this paragraph include only qualified psychiatrists and clinical psychologists with appropriate education and training in psychological test interpretation.

19. All Inmates committed to the Department of Corrections and Criminal Rehabilitation may only be given mental health treatment without his/her informed consent pursuant to the standards of the New Mexico Health and Developmental Disabilities Code.

20. Aversive therapy will not be utilized.

21. Any involuntary transfers of prisoners to mental hospitals or to other special living units for the treatment of mental health problems will be conducted consistent with the due process requirements outlined in *Vitek v. Jones*, 48 U.S.L.W. 4317 (March 25, 1980).

22. One member of the mental health staff will be designated as the official liaison person with the New Mexico forensic hospital. That person will be responsible for assuring that all appropriate documents are transferred between institutions concerning the past and future care and treatment of the inmate and to assure that the appropriate follow-up care is provided when inmates are returned from the hospital to the penitentiary.

23. Good faith efforts will be made to hire qualified mental health professionals who speak the same language as segments of the inmate population.

24. Special psychiatric units in the infirmary or psychiatric area can be used only under the direct supervision of a doctor or psychiatrist and only for legitimate medical or psychiatric reasons.

POLICY STATEMENT

EXHIBIT F

SUBJECT: STAFFING AND TRAINING

1. Adequate staff and staff training will be provided to reasonably assure the safety and protection of inmates and to allow the Department of Corrections to comply with all other orders or policy statements in *Duran v. Apodaca*.

2. At least one correctional officer will be stationed in each cellblock so that all inmates will have voice contact with a correctional officer at all times. In addition, irregular rounds of the entire cellblock will be made at least one time per hour.

3. As soon as possible, but no later than September 1, 1980, at least one correctional officer will be stationed between the inner gate and outer gate of each dormitory at the Penitentiary of New Mexico at Santa Fe at all times that any inmates are housed in said dormitories. The said officers will position themselves in such a manner that they may have visual observation of inmates at all times.

4. Training will be provided to all staff which is equivalent to that required by the Manual of Standards for Adult Correctional Institutions of the Commission of Accreditation for Corrections.

5. As soon as is practicable, a qualified person or persons selected by the Department will review the current facility and its use; all plans for future renovation or building; all plans for future jobs, activities, programs, and services to members of the *Duran* class; and the requirements of the orders or policy statements in *Duran v. Apodaca*; and will make comprehensive recommendations as to the number of correctional staff needed under the various conditions presented to meet the requirements of those orders and policy statements. Those recommendations will be provided to the parties.

Within 30 days of receipt of said recommendations, the Department of Corrections will file with the Court and with the plaintiffs a plan for complying with said recommendations, including timetables, or will show cause why they should not comply.

If the plaintiffs deem the recommendations, the plan or the timetables to be inadequate they may apply to the Court for further relief.

POLICY STATEMENT

EXHIBIT G

MAXIMUM SECURITY

1. Maximum security classification is used when inmates require closer supervision and separate housing from the general population. Every effort shall be made to return maximum security inmates to the general population as soon as practicable, but some inmates may spend relatively extensive periods of time in this status. Maximum security classification is not for the purpose of punishment. This policy statement has no application to those inmates confined in disciplinary segregation.

2. The words "threat to the security of the institution" or their equivalent, as used in any order in *Duran v. Apodaca*, means a substantial threat of an act or acts of violence upon others, substantial destruction of state property, escape or attempted escape, riot or inciting a riot, or taking of hostages. When action is taken based upon a finding of a threat to the security of the institution, the specific reason(s) comprising the threat will be documented.

3. An inmate may be placed involuntarily in maximum security by the classification committee pursuant to the criteria stated in one or more of the following five subsections:

(a) The classification committee specifically finds the following:

(i) The Disciplinary Committee has recently found that the inmate has committed an act of violence, substantial destruction of state property, escape or attempted escape, riot or inciting a riot, or taking of hostages, and as a result of such finding has been sentenced to disciplinary segregation; and

(ii) Because of such finding, considered along with all other classification and other relevant data, there is a

substantial likelihood that if released to the general population the inmate would present a substantial threat to the security of the institution or to the safety of others.

(b) The classification committee specifically finds, based upon recent overt acts, that an inmate presents an imminent threat of serious bodily harm to others or an imminent threat of escape. Pending action of the classification committee under this subparagraph, the ranking shift officer may temporarily house an inmate in maximum security status until the next working day, at which time the classification committee shall determine whether the inmate will remain in maximum security status as set forth above. The ranking shift officer who temporarily detains an inmate under this section will document the reasons for the action and will give a copy of the document to the inmate within eight hours.

(c) The classification committee specifically finds that the inmate is a victim of a violent act and there is clear and convincing evidence that if he remains in general population he will be subjected to additional violent acts.

(d) The classification committee specifically finds that the inmate's safety is jeopardized by an immediate life threatening conflict with other inmates in the general population which requires temporary separation from the general population because he cannot otherwise be provided with adequate protection.

(e) The classification committee specifically finds that the inmate has demonstrated a continuous, substantial and documented violation of institutional rules. This sub-section cannot be used in combination with disciplinary action for the same acts. An inmate may not be classified in this category for more than 5 days at a time.

4. An inmate may also be placed in maximum security if the inmate believes that housing in the general popu-

lation places the inmate in jeopardy of serious bodily harm and requests placement in maximum security. Inmates requesting assignment to maximum security may be required to sign a written request slip, stating their desire for assignment to maximum security. Inmates requesting assignment to maximum security may be placed therein immediately without waiting for the formal hearing before the classification committee.

Any inmate who has voluntarily placed himself in maximum security status will be reclassified within 5 working days of a request to be reclassified. However, the inmate may be reclassified into maximum security status involuntarily if any of the conditions of paragraph 3 above are met.

5. A statement detailing the alleged specific facts and specific reasons for classifying an inmate into maximum security shall be given to the inmate at least 24 hours prior to the classification hearing. If the basis for placing the inmate into maximum security involves the testimony of a confidential informant, the disclosure of which would place such informant in jeopardy of serious bodily harm, the inmate shall be given a summary of the facts upon which maximum security classification is being requested sufficient to allow him to challenge the truthfulness of the facts and/or the need for maximum security status.

6. Prior to placing an inmate in maximum security, the classification committee must make a finding of fact based upon a preponderance of the evidence that the requirements of paragraph 3 above have been met. Prior to classifying an inmate in maximum security status, the classification committee shall explore alternatives other than specialized housing and shall prepare a statement of the alternatives explored and the reason for rejecting each of them. If an inmate is placed in maximum security housing, the inmate will be housed in a single occupancy cell or room that provides safety and comfort

and shall be allowed to participate in institutional programs as set forth herein; however, if there is an emergency caused by riot, fire or other disaster making living units unusable, two people may be housed in said cells or rooms for a period of short duration while arrangements are made for alternate housing. Each case shall be reviewed on the basis set forth in paragraph 7, with the goal of terminating the separate housing assignment as soon as practicable.

7. The classification committee shall review the status of each inmate at least every 7 days for the first two months and at least every 30 days thereafter. More frequent reviews may be scheduled based on the request of the case manager or the inmate. At each review, the classification committee shall determine whether there is substantial evidence to indicate that the initial reasons for classification into maximum security still exist. If they do not, the inmate shall be reclassified out of maximum security status. The inmate can appear before the classification committee at each review and make a statement. In cases where the inmate refuses to appear, the committee members shall sign and document the specific reasons for the inmate's absence and make an evaluation for the inmate's working file. Nothing in this paragraph shall prevent the classification committee from making additional findings pursuant to the standards and procedures set forth above, to the effect that an inmate should be classified into maximum security status.

8. If an inmate is classified maximum security under the provisions of paragraph 3(b) hereof, the inmate's status must be reviewed by the classification committee within 7 days after the initial classification and every 7 days thereafter, and inmates shall not be housed in such status for more than 30 days. At each review, the classification committee must make a specific finding of the behavior justifying continued classification to maximum security and document that there is substantial evidence

to indicate that the reasons for the initial placement still exist.

9. In each case of an inmate classified maximum security involuntarily for over 60 days, the classification committee shall establish a set schedule of personal and program objectives involving gradual reintegration into the general population, the completion of which without an overt act evidencing an actual threat of serious bodily harm to others or escape should result in the inmate's reclassification from maximum security within an additional 60 days. However, if the classification committee documents compelling evidence that reclassification from maximum security would produce serious injury to the inmate or others or present a substantial threat to the security of the institution, then neither reclassification nor reintegration is required. Said evidence must include:

- (a) A murder within the previous two years; or
- (b) Activity in a prison riot within the preceding two years in which persons suffered serious bodily harm as a direct and intended result of action of the inmate; or
- (c) At least two recent previous overt acts causing serious bodily injury during reintegration or immediately after reclassification from maximum security under these provisions; or
- (d) An escape or attempted escape within the previous six months; or
- (e) The inmate meets the terms of paragraph 3(c) or (d) above.

10. Prisoners classified maximum security may be denied or removed from a program, job, activity, or canteen privileges generally available to the population only upon a specific, documented finding by the classification committee of demonstrated necessity for each such action based upon the recent particular behavior of

the prisoner or actions of other prisoners. In any event, every prisoner in maximum security status shall receive an opportunity for a minimum of one hour of recreation (outdoors, weather permitting) daily. In addition, as soon as practicable, consistent with the plan developed relating to inmate activity, every prisoner in maximum security status will receive an opportunity for at least five additional hours, five days a week, of meaningful programmed activities determined by the classification team. In the interim, good faith efforts will be made to provide additional meaningful programmed activities for all inmates housed in maximum security status, including, for example, expanded recreational activity, individually prescribed education and other individual or group activities utilizing staff or community resources.

11. Inmates who have been classified as maximum security will be provided with the following:

- (a) Clothing and linen issue and exchange similar to that provided to the general population;
- (b) Meals provided to the general population;
- (c) Correspondence privileges similar to that provided to the general population;
- (d) Showers and shaving five days a week;
- (e) Hair grooming and barbering;
- (f) A minimum of two hours visitation per week.

12. Access to legal resources for maximum security inmates will be provided pursuant to the consent decree in *Duran v. Apodaca*.

13. Provision will be made for prisoners in maximum security status to have access to the general library or a library cart to check out as many as five books at least every seven days.

14. Inmates in maximum security status will be allowed to retain in their personal living area at least five books and all legal papers.

15. Inmates classified in maximum security housing will be housed in single occupancy cells or rooms; however, if there is an emergency caused by riot, fire or other disaster making living units unusable, two people may be housed in said cells or rooms for a period of short duration while arrangements are made for alternate housing. They may retain their personal property, as permitted in general population, unless the classification team finds that in the case of an individual inmate, the removal of specific designated items of personal property is essential to protect the safety of the inmate or others, a fire hazard would be created, or the amount of the personal property would be excessive so as to cause violation of health, sanitation, or fire safety standards. If property is removed, it will be stored in a safe place and an inventory will be maintained. All inmates in maximum security status may have basic items needed for personal hygiene, as well as items such as eyeglasses, dentures and writing material.

16. A case manager will visit five days per week all areas in which maximum security inmates are housed and will be available to help each inmate who desires assistance or information. A qualified medical professional will conduct sick call daily in each maximum security living area and will examine every inmate who so requests to determine what medical care, if any, is required. A log will be maintained documenting each visit and each inmate contact.

17. A qualified clinical psychologist or psychiatrist will assess the status of each person classified as maximum security at least once each 30 days. Said assessment will include a personal interview with the inmate.

18. Visitation by religious personnel to inmates in the maximum security living areas will be governed by

the terms of the visitation consent order in *Duran v. Apodaca*. Inmates in the maximum security living areas will be provided with access to appropriate religious services.

19. Correctional officers assigned to maximum security living areas should be tolerant and trained to meet the needs of inmates so classified. Each supervisor will supervise and evaluate the on-the-job performance of employees assigned to maximum security living areas.

20. The Warden will designate an official to be responsible for the administration and operation of maximum security living areas who will monitor and evaluate the entire program in the areas as often as necessary to insure compliance with all applicable policy statements. The following personnel shall visit maximum security living areas:

1) Warden	Weekly visit
2) Deputy Warden	Weekly visit
3) Associate Warden/Inmate Management	Daily visit ¹
4) Superintendent Correctional Security	Daily visit
5) Chief Psychologist	Weekly visit
6) Medical Personnel	Daily visit
7) Caseworker	Daily visit
8) Chief, Classification and Programming	Weekly visit
9) Chaplain	Weekly visit
10) Shift Captain	Once per tour of duty

¹ Daily visit means one per each normal working day; days off are excluded.

21. A systematic records system will be maintained for all inmates assigned to maximum security living areas. A general activity log will be maintained for inmates and activities within such areas. In addition, a log will be maintained for all personnel entering for inspection and treatment of each inmate. A safety and sanitation officer will inspect the areas daily to insure that they are sanitary. These inspections will be recorded.

*POLICY STATEMENT**EXHIBIT H**SUBJECT: INMATE DISCIPLINE*

1. *POLICY*: It is the policy of this institution to provide a safe environment for both inmates and staff and to offer programs for all inmates who wish to develop their potential for maintaining a successful community adjustment following their release. In order to implement this policy it is essential that reasonable standards of control and discipline are established and maintained. Inmates and staff will be provided with complete copies of this policy and procedure and additions/revisions as they are adopted.
2. *PURPOSE*: The purpose of this policy statement is to provide written guidelines to insure that inmate control and discipline are established and maintained in accordance with the following objectives:
 - (a) Require individual inmate compliance with reasonable behavior standards and limitations.
 - (b) Insure the general welfare and safety of all persons living and working within the institution.
 - (c) Establish and maintain fair disciplinary procedures and practices based on due process.
3. *GENERAL PRINCIPLES*: The following general principles shall be applicable in every disciplinary action taken against any inmate:
 - (a) The action shall be reasonable and proportionate in relation to the violation.
 - (b) The action shall be taken in an impartial and non-discriminatory manner.
 - (c) The action must never be arbitrary or retaliatory.
 - (d) Physical abuse is strictly prohibited.

- (e) Accurate, detailed reports of all disciplinary actions shall be maintained in accordance with this policy statement.
- (f) The words "threat to the security of the institution" or their equivalent, as used in any orders in *Duran v. Apodaca*, means a substantial threat of an act or acts of violence upon others, substantial destruction of state property, escape or attempted escape, riot or inciting a riot, or taking of hostages. When action is taken based upon a finding of a threat to the security of the institution, the specific reason(s) comprising the threat will be documented.

4. **INFORMATION TO INMATES:** Each inmate will be provided, in writing, at the time of his or her arrival, with the following information:

- (a) Policy Statement on Inmate Discipline.
- (b) Policy Statement on Grievance Procedures.
- (c) Policy Statement on Correspondence Regulations.
- (d) Policy Statement on Visiting Regulations.
- (e) Criteria for work release-school release.
- (f) Criteria for transfer among institutions.
- (g) Criteria for furloughs.
- (h) Policy Statement on Good Time.
- (i) Policy Statement on Maximum Security Status.

This information will be issued at the Intake and Classification Center and a signed, dated receipt for same will be obtained and placed in the central file of each inmate.

5. **GENERAL PRINCIPLES:**

- (a) Any act, although not specifically listed in this policy, that would be either a felony or mis-

demeanor under the Criminal Code of the State of New Mexico or the laws of the United States of America, will constitute a major or minor violation, depending on its status as a felony or misdemeanor.

- (b) In those cases where an inmate allegedly commits an act covered by statutory law, the case will be referred for evaluation for possible criminal prosecution to the local District Attorney.
- (c) An attempt to commit a major offense will not ordinarily be treated with the same severity and sanctions as the actual commission of the underlying offense.
- (d) Any portion of a sanction may be suspended for a specified period of time. Inmates will be informed in writing of the conditions under which the suspended sanction may be invoked in the future.
- (e) At the request of the inmate, he or she may receive a continuance of their disciplinary hearing when criminal prosecution is pending.
- (f) It is understood that the time limits in disciplinary segregation are exclusive of time spent in maximum security status due to reclassification. Disciplinary action does not preclude reclassification into maximum security status pursuant to the policy statement in maximum security after time spent in disciplinary segregation.

6. MAJOR OFFENSES AND SANCTIONS (Category A)

- (a) Riot or inciting a riot, confinement in disciplinary segregation for up to 30 days; loss of good time not to exceed all good time.

- (b) Taking of hostages, confinement in disciplinary segregation for up to 30 days; loss of good time not to exceed all good time.
- (c) Arson, confinement in disciplinary segregation for up to 30 days; loss of good time not to exceed all good time.
- (d) Assault with a weapon on an employee, civilian or inmate, confinement in disciplinary segregation for up to 30 days; loss of good time not to exceed 365 days.
- (e) Sexual assault, confinement in disciplinary segregation for up to 30 days; loss of good time not to exceed 365 days.
- (f) Unjustified killing of any person, confinement in disciplinary segregation for up to 30 days; loss of good time not to exceed all good time.
- (g) Escape, confinement in disciplinary segregation for up to 30 days; loss of good time not to exceed all good time.
- (h) Forging or altering official facility paper or documents, confinement in disciplinary segregation for up to 30 days; loss of good time not to exceed 180 days.
- (i) Threatening others who refuse to participate in a work stoppage or work strike or participating in a work stoppage or work strike, confinement in disciplinary segregation for up to 30 days; loss of good time not to exceed 180 days.
- (j) Giving or offering any official or staff member a bribe, confinement in disciplinary segregation for up to 30 days; loss of good time not to exceed all good time.

- (k) Possession, introduction, or manufacture of a firearm, explosive or ammunition, confinement in disciplinary segregation for up to 30 days; loss of good time not to exceed 365 days. [*]

OFFENSES AND SANCTIONS (Category B)

The offenses in Category B shall be considered to be major, only if one or more of the following factors is found to be present by the Disciplinary Officer and/or Disciplinary Committee:

- (a) A life threatening incident is involved.
- (b) A showing of a malicious state of mind, which threatens the security of the institution.
- (c) A direct and substantial threat to the security of the institution.
- (d) The behavior is repeated or has previously been the subject of major disciplinary action.
- (e) Substantial property damage has occurred.
- (f) Any injury received was not of a minor nature and required medical attention.
- (g) The offense was committed by more than one person, excluding offenses in which more than one person is required to commit the offense.

If evaluated as a Major Report, the sanctions in the succeeding subparagraphs will be applied. If evaluated as a Minor Report, the minor offense sanctions listed in paragraph 7 will be applied.

[*] [On July 10, 1985, the district court added paragraph (l) :

(l) Possession, introduction, or manufacture of any contraband instrument which is capable of causing death or serious physical injury; confinement and disciplinary segregation for up to 30 days, and/or loss of good time not to exceed 180 days.]

CATEGORY B

These principles apply to the following offenses:

- (a) Consensual engagement in sexual acts with others; confinement in disciplinary segregation for up to 15 days; loss of good time not to exceed 30 days.
- (b) Willfully refusing to obey a lawful order of any staff member; confinement in disciplinary segregation for up to 15 days; loss of good time not to exceed 90 days.
- (c) Stealing; confinement in disciplinary segregation for up to 25 days; loss of good time not to exceed 180 days.
- (d) Possession of money without authorization; confinement in disciplinary segregation for up to 15 days; loss of good time not to exceed 90 days.
- (e) Failure to report to an institutional assignment, refusing to accept a work assignment, or failing to perform work as properly instructed by a supervisor; confinement in disciplinary segregation for up to 15 days; loss of good time not to exceed 60 days.
- (f) Possession, introduction, or manufacture of a sharpened instrument, tool, or knife; confinement in disciplinary segregation for up to 20 days; loss of good time not to exceed 120 days.
- (g) Failure to follow posted safety or sanitation regulations resulting in damage or personal injury; confinement in disciplinary segregation for up to 15 days; loss of good time not to exceed 90 days.
- (h) Use of abusive words or gestures to a staff member or other inmate that are intended to provoke a fight, cause the violation of other institutional

regulations or threatens the security of the institution; confinement in disciplinary segregation for up to 15 days; loss of good time not to exceed 45 days.

- (i) Intentionally interfering with count; confinement in disciplinary segregation for up to 20 days; loss of good time not to exceed 60 days.
- (j) Possession, manufacture, or introduction or use of any narcotic, narcotic paraphernalia, drugs or intoxicants not prescribed for the individual by the medical staff, or refusal to submit to an authorized drug test; confinement in disciplinary segregation for up to 25 days; loss of good time not to exceed 180 days.
- (k) Possession, alteration, using, or being under the influence of alcohol or other intoxicants, or refusal to submit to an alcohol test upon request from authorized personnel; confinement in disciplinary segregation for up to 15 days; loss of good time not to exceed 60 days.
- (l) Willful destruction or sabotage or altering of state property or property of another person; confinement in disciplinary segregation for up to 25 days; loss of good time not to exceed 180 days and/or restitution.
- (m) Possession of contraband items (i.e., anything not allowed to be received through the mail, not sold at the canteen or issued by the State); confinement in disciplinary segregation for up to 15 days; loss of good time not to exceed 60 days.
- (n) Conduct with a visitor in violation of posted visiting regulations; confinement in disciplinary segregation for up to 15 days; loss of good time not to exceed 30 days.

- (o) Violating a condition of furlough, school or work release; confinement in disciplinary segregation for up to 15 days; loss of good time not to exceed 90 days.
- (p) Knowingly making a false statement to a staff member which causes the violation of other institutional regulations or threatens the security of the institution; confinement in disciplinary segregation for up to 15 days; loss of good time not to exceed 60 days.
- (q) Gambling; confinement in disciplinary segregation for up to 15 days; loss of good time not to exceed 90 days.
- (r) Violation of correspondence regulations; confinement in disciplinary segregation for up to 15 days; loss of good time not to exceed 60 days.
- (s) Possession of another's property without written approval of shift supervisor, demanding, receiving or giving or bartering of property belonging to others; confinement in disciplinary segregation for up to 15 days; loss of good time not to exceed 90 days.
- (t) Loaning of property or items of value for profit or increased return; confinement in disciplinary segregation for up to 15 days; loss of good time not to exceed 60 days.
- (u) Extortion, blackmail, or demanding or receiving money or anything of value in return for protection from the individual or others to avoid bodily harm, or under threat of informing; confinement in disciplinary segregation not to exceed 25 days; loss of good time not to exceed 90 days.
- (v) Fighting with another person, without weapons, not causing injury requiring medical treatment;

confinement in disciplinary segregation for up to 30 days; loss of good time not to exceed 180 days.

- (w) Giving or offering any staff member or official anything of value, confinement in disciplinary segregation for up to 10 days; loss of good time not to exceed 30 days.
- (x) Self-mutilation not caused by psychiatric or psychological problems; confinement in disciplinary segregation for up to 15 days; loss of good time not to exceed 60 days.
- (y) Attempt to commit a major misconduct offense as defined in this Policy Statement (this must include an overt act in furtherance of said attempt); confinement in disciplinary segregation for up to 25 days; loss of good time not to exceed 90 days.

7. *MINOR REPORTS AND SANCTIONS:* Minor reports are reports of violations in which none of the criteria listed in Major Offenses and Sanctions (category B) are present or which were reduced from major reports.

The following prohibitive acts are minor reports:

- (a) Smoking where prohibited.
- (b) Using any machinery or equipment contrary to instructions or posted safety standards.
- (c) Improper or unauthorized use of equipment or machinery.
- (d) Failure to follow safety/sanitation regulations.
- (e) Failure to perform work as properly instructed by a staff member.
- (f) Intentional unexcused absence from work or school assignment.

- (g) Mutilating or altering clothing.
- (h) Possession of gambling paraphernalia.
- (i) Willfully failing to keep one's person, living area or work station in accordance with written, official institutional standards.
- (j) Tattooing.

Disciplinary authority for minor report disposition is delegated to the Disciplinary Officer. When the Disciplinary Officer receives a report of inmate misconduct, and following review and hearing within seven working days, he has the authority to impose minor sanctions. His decision is subject to review by the institutional superintendent who may approve, reduce or modify, refer for further investigation or dismiss. The superintendent may refer the case to the Disciplinary Officer where there is new evidence of a violation of institutional policy, or the sanction is inappropriate. The sanctions for a minor report can only consist of: dismissal of the charges; reprimand and warning; extra duty not to exceed one hour per day for no more than 30 days; confiscation; restitution; apology; restriction from social activities, e.g., movies and similar social entertainment not to exceed 30 days.

8. *MISCONDUCT REPORTS*: Informal resolution of minor incidents is encouraged, however, when any employee witnesses a serious violation of institutional rules or regulations, or has reasonable belief that a serious violation has occurred, the employee has a responsibility to prepare a misconduct report.

The initial misconduct report shall contain the date and time of the violation, the date and time the report was written and the date and time the report was submitted to the shift supervisor for review. The report shall include the specific rules violated; a for-

mal statement of the charge; any unusual inmate behavior; any staff or inmate witnesses; disposition of any physical evidence; any immediate action taken, including the use of force; and the reporting officer's signature.

Following the initial investigation by the reporting employee, the misconduct report must be submitted for supervisory review and a copy given to the inmate within 24 hours (or one regular working day) from the date of the incident, or when it was reported to the reporting officer. Where additional investigation is required by the reporting employee, written approval can be obtained from the warden. The written approval must be obtained in advance of the filing of the report and attached to the report. The warden may grant up to a 48 hour (or two working days) extension for good cause shown, i.e., where there is a showing of extenuating circumstances such as the perpetrator is not identified; co-conspirators are unidentified; there is a criminal investigation controlled by other agencies; or in which the inmate requests a delay in order to protect his right to remain silent); or there is a work stoppage or mass action. In all cases, however, the report will be provided to the inmate within 24 hours from the date of the incident or when made known to the reporting officer. A dismissal will be entered in the case where these time requirements are not met and extensions are not granted.

However, in the event of a continuing emergency, such as a riot, which prevents notice and hearing as required, said notice and hearing will be provided as soon as is practical.

Whenever an incident and/or inmate poses an immediate threat to employees, inmates or the security of the institution, the shift supervisor and/or other

appropriate supervisor must be notified immediately by the reporting employee so that prompt, appropriate steps may be taken to control the situation.

An inmate may not be placed in disciplinary segregation prior to a hearing. However, if the inmate poses a substantial threat to the security of the institution, other inmates, or staff, he may be housed pending a disciplinary hearing as if he were classified as maximum security. When such circumstances are found to exist, the officer placing the inmate(s) in pre-hearing detention will document the reasons and submit them with his report to the supervisor. The shift supervisor will immediately review the report and the circumstances surrounding the incident and determine whether such confinement is necessary. On the next working day, the Disciplinary Officer will review the need for continued maximum security housing pending a disciplinary hearing. The review will be based on the criteria outlined in this Policy Statement.

9. *SUPERVISORY REVIEW*: The shift supervisor must conduct an independent review of all misconduct reports within twenty-four (24) hours (or one working day) after reviewing the report from the reporting officer.

Upon receiving the report, the reviewing supervisor must record the date and time the review was begun and completed.

The supervisory review may be delegated to a lieutenant, subject to the shift or area supervisor's approval but no portion of the review may be conducted by the reporting employee or a non-supervisory employee. The reviewing employee or a non-supervisory employee may consult with any persons during his review, except the chairman and/or members of the Disciplinary Committee.

During the review, the supervisor must inform the inmate that he has the right to remain silent, and if criminal charges appear likely to be filed, the inmate will be given the Miranda Warnings. The reviewing supervisor must file the report with the Disciplinary Officer within eight hours after receiving the report from the reporting officer.

10. *DISCIPLINARY OFFICER:* Within two working days or 48 hours after receiving the misconduct report from the reviewing supervisor, the Disciplinary Officer will investigate the report, question all known witnesses, collect evidence, documents and statements, and will prepare a report of his findings and recommendation for submission to the institution superintendent.

All misconduct reports and actions shall be carefully reviewed by the Disciplinary Officer and if it meets the criteria of a major report, the inmate will be instructed to appear before the Disciplinary Committee at the next scheduled meeting. The inmate will receive a copy of the report and the action, and the grounds for his finding the report to be a major report. The entire report will be forwarded to the Central Records Office.

In the case of a minor report, the Disciplinary Officer will conduct a hearing within seven days of the incident or the reporting of the incident. The inmate may request that witnesses be examined, statements taken, may present his own statements and any relevant evidence. A written decision with findings will be provided to the inmate. When an inmate is found not to have committed the alleged offense, the disciplinary report will be removed from all files on the inmate. All such removed disciplinary reports will be maintained in a separate file for litigative or other non-institutional purposes only, but such reports will not be made available to or utilized by

PNM staff or the Parole Board, except at the request of the inmate. All disciplinary reports, regardless of disposition, may be kept and used for statistical or research purposes providing all identification is removed. A dismissal will be entered in a case where the time limitations are not met or extensions are not granted unless a continuing emergency precludes normal time limits from being followed.

11. **MAJOR REPORT DISPOSITION:** Disciplinary authority for the disposition of major misconduct reports is delegated only to the Disciplinary Committee. The committee shall consist of the following: staff member appointed by the institutional superintendent (chairman); institutional or Department employee (as assigned); casemanager or other Department employee (as assigned). Any other Department employee may be called by the committee as a resource to provide information or counsel. No employee may sit as a member of the committee if he had any role in the case being referred to the committee or if he or she reported or investigated the case before the committee, or if he or she was a witness to any alleged actions leading to the charge.

The committee will conduct hearings, make findings and impose appropriate sanctions for inmates found guilty of major misconduct. This committee may also reduce the report to a minor misconduct report and impose appropriate sanctions. However, only the Disciplinary Committee can, as a result of a major misconduct report, order that an inmate be placed in disciplinary segregation, recommend to the Classification Committee that an inmate's program assignment be modified, that the inmate be transferred from one institution to another, or recommend to the classification committee that an inmate's MGT or SGT be withheld or forfeited in accordance with PNM's Good Time Policy.

12. *DISCIPLINARY COMMITTEE PROCEDURES*: The Disciplinary Committee will conduct its proceedings according to the following guidelines:

- (a) The Disciplinary Committee will meet each Monday, Wednesday, and Friday and at other times as designated by the chairman and will prepare a record or written summary of its proceedings.
- (b) A record or written summary of the entire proceedings will be maintained by the institution and shall clearly document that the inmate was advised of his rights, including the appeal procedure. A tape recording will be made of the hearing. Excluded will be any reference to confidential sources that include identifying facts. The committee's findings will document the specific evidence relied upon and the reasons for the action taken should be specifically described, unless doing so would jeopardize institutional security.
- (c) An inmate will be given advance written notice of the charge(s) against him by the shift supervisor or Disciplinary Officer not less than 24 hours before his appearance before the Disciplinary Committee. Inmates will receive a hearing within seven regular working days from the time they receive notice of the charges, the time the incident was reported, or the time the incident occurred, unless they make a written request for a continuance. A continuance may be granted by the Disciplinary Committee to either the inmate or the institution in order to prepare their case or where additional evidence is necessary.

The inmate may request the assistance of another inmate or staff member to assist in the preparation and/or presentation of his case. Inmates are not entitled to be represented by legal counsel at

hearings before the Disciplinary Committee. If the inmate being charged cannot read or write English adequately to comprehend and defend the charge, assistance will be provided by a person capable of communicating with the inmate and the Disciplinary Committee. If an employee declines a request to represent an inmate, the inmate may select alternates. Employee representation may not include members of the Disciplinary Committee. The employee or inmate representative will be given a reasonable amount of time to consult with the inmate and investigate the incident prior to proceeding with the hearing.

- (e) The inmate charged will be present throughout the hearing except during deliberations or when in the opinion of the committee the presence of the inmate would jeopardize the physical safety of staff or inmates or his disruptive behavior during the hearing prevents the hearing from proceeding in an orderly fashion. When the inmate is excluded, the reasons for this action will be stated on the record. A summary of the evidence introduced in his absence, excluding any reference to confidential sources, will be provided.
- (f) An inmate will be permitted to make his own statement, to call witnesses and to present documents in his behalf, providing the calling of witnesses and/or the disclosure of documentary evidence does not jeopardize the physical safety of staff and inmates. The committee chairman will also call those witnesses he deems necessary and reasonably available and may exclude witnesses whose testimony is irrelevant or cumulative. The chairman will state these reasons for the record. Inmate witnesses may be questioned by the members of the committee and/or the inmate or his representative.

- (g) At the conclusion of the hearing, the committee chairman will provide the inmate with an oral summary of the charges, evidence and testimony which have been presented. Information which would jeopardize the security of the institution will be excluded from this summary. Where information obtained from a confidential, reliable informant is used, the committee will evaluate the reliability of the informant and state on the record their grounds for finding the informant reliable. The reliability of the informant shall be based on: the informant having provided reliable information in the past, the information being offered is based on first hand observations, or there is corroboration either from another source or through physical evidence showing the reliability of the informant's information. No inmate shall be found to have committed the offense solely on the testimony of a confidential informant. A summary of evidence so obtained, excluding identifying information, will also be given orally to the inmate.
- (h) The chairman will provide a written summary of the evidence, including documents, statements, physical evidence which were used as a basis for filing the misconduct report and all the evidence on which the committee based its decision and reasons for the action taken. The decision will be based only on the evidence presented at the hearing. Decisions will be based on a preponderance of the evidence. A copy of this report will be given to the inmate within five days of the committee's decision. The appeal forms will be attached to the written summary provided to the inmate. Inmates will be allowed to obtain assistance in preparation of these forms.

- (i) A hearing may be conducted in the absence of the inmate charged when the inmate refuses to appear and cannot be brought to the hearing without the use of force. In such cases, the refusal must be obtained in the presence of two officers, who will submit written reports attesting to the refusal to the Disciplinary Committee.
- (j) When an inmate escapes from custody, the Disciplinary Committee may conduct a hearing in the inmate's absence. When the inmate is returned to the institution, he may request another hearing before the committee on the escape charge if sanctions such as loss of Good Time were imposed at the initial hearing. Following the rehearing, the committee may dismiss the charges, or modify the disposition, but may *not* increase the sanctions imposed at the initial hearing.

14. *DISCIPLINARY COMMITTEE DISPOSITION*: The committee may take any or a combination of the following actions:

- (a) Dismiss any charge.
- (b) Impose any sanctions appropriate to a minor report, where the committee has reduced the report accordingly.
- (c) Direct that an inmate be placed or be retained in disciplinary segregation unit for a specified period up to the allowable maximum period.
- (d) The Disciplinary Committee may recommend that an inmate be reviewed after his term in disciplinary segregation for classification into maximum security status.
- (e) Recommend to the Classification Committee that a specified amount of Meritorious and/or Statutory Good Time be forfeited.

- (f) Suspend visiting privileges with the visitor involved in the incident when the violation involves these privileges, not to exceed 30 days.
 - (g) suspend the allowable punishments.
15. *FINAL APPROVAL OF DISCIPLINARY ACTIONS:* Actions taken by the Disciplinary Committee must be approved by a majority of the committee and forwarded to the superintendent for review. Decisions will be based on a preponderance of the evidence. The chairman of the committee will inform the inmate, at the conclusion of the hearing, that the action is subject to review and revision by the institution superintendent. The inmate will also be informed that the institution superintendent may approve, reduce or modify the decision, reverse the decision and order a new hearing within 72 hours, or three regular working days, from the date of the initial hearing if the warden reasonably determines that the decision was not based on substantial evidence or was based on incomplete information or there is newly discovered exculpatory evidence which was not available to the committee at the time of the hearing. When an inmate is found not guilty, the disciplinary report will be removed from all files on the inmate. All such removed disciplinary reports will be maintained in a separate file for litigative or other non-institutional purposes only, but such reports will not be made available to or utilized by PNM staff or the Parole Board, except at the request of the inmate. All disciplinary reports, regardless of disposition, may be kept and used for statistical or research purposes providing all identification is removed.
16. *APPEALS FROM DISCIPLINARY ACTIONS:* At the time the Disciplinary Committee gives an inmate notice of the decision, the committee will advise the inmate of his right to appeal the decision to the Sec-

retary of the Department of Corrections and Criminal Rehabilitation (hereinafter secretary).¹ The inmate will give signature verification of this advisement, and if he waives the right to appeal, he will sign an appropriate statement to that effect. Within five days the committee will provide the inmate with the written summary, including findings of fact, referred to in 12(h). A copy will also be submitted to the superintendent for his approval at this time.

- (a) Any inmate who feels he has received an unjust decision from the Disciplinary Committee may appeal to the Secretary for final adjudication of the matter.
- (b) The inmate will have 10 working days from the day he receives the written findings to outline, in writing, the basis for the appeal and the names of any witnesses required to substantiate the appeal contention(s). Failure to submit written notice of appeal within the deadline will indicate that no appeal has been requested. Inmates housed in segregation will submit required forms to the casemanager within the 10 day time period, who will refer them to the chairman of the Disciplinary Committee.
- (c) After the inmate has submitted the completed appeal form, the misconduct report, record of disciplinary action and all related statements or documents will then be forwarded to the Corrections Commission Hearing Officer for review within five working days by the institutional superintendent.
- (d) Upon receipt of the appeal materials, the Hearing Officer will determine whether the appeal

¹ The Secretary may delegate to the Corrections Commission the authority to consider inmate appeals. The Secretary retains the final authority, however, to decide inmate appeals.

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should be considered on-the-record or de novo. In reviewing the appeal, the Hearing Officer will consider the following factors:

- 1) Compliance with disciplinary policies.
 - 2) Was the decision of the Disciplinary Committee based on substantial evidence and facts?
 - 3) Was the disciplinary sanction proportionate to the offense?
 - 4) New evidence or witnesses.
- (e) The burden of proof is on the inmate to prove the contentions stated in his notice of appeal. Appeals based on frivolous contentions (i.e., without a rational claim or basis in fact or policy) will be heard only on-the-record.
- (f) If an appeal is to be considered on-the-record, the Hearing Officer will review the record and make a recommendation as to the disposition of the appeal to the Secretary.
- (g) If an appeal is to be considered de novo, the Hearing Officer will set a date for the hearing. The witnesses for the inmate, and the institution, will be notified of the date, time and place of the hearing. Witnesses will be provided with notice at least seven days prior to the hearing.

17. *APPEAL HEARING PROCEDURES*: At a de novo hearing, the witnesses for the institution will appear before the Hearing Officer, will be sworn in, and will be responsible for the presentation of all relevant testimony, information, statements, documents and evidence necessary to support the original decision of the Disciplinary Committee. If new or additional information or evidence in the case is acquired after the appeal hearing, the witnesses are responsible for submitting the information to the Hearing Officer. If

witnesses for the institution do not appear at the hearing, the Hearing Officer, at his discretion, may recommend the report be dismissed. At least seven days' notice will be provided to witnesses. After the witnesses for the institution have testified, the inmate will appear before the Hearing Officer. The Hearing Officer will summarize the case and inform the inmate of the evidence presented. The inmate will then be sworn in and present his basis for the appeal, and introduce affidavits or documents and any other information relevant to his case. Inmates will not be represented by attorneys, but inmates may request witnesses from the staff or prison population to appear on their behalf, providing the calling of witnesses and/or the disclosure of the documentary evidence does not jeopardize the physical safety of staff or inmates. Witness testimony of an irrelevant or repetitious nature may be refused by the Hearing Officer at his discretion. Reasons for the exclusion of such witnesses or testimony will be stated on the record. Employee witnesses for the institution will not be interrogated or cross-examined by the appealing inmate and/or in the presence of the appealing inmate. A tape recording will be made of the appeal hearing.

The Hearing Officer will not reinvestigate the case, but may request additional information or documents be submitted by witnesses for the institution or by the witnesses for the inmate within reasonable time limits after the appeal hearing.

The Hearing Officer will inform the inmate of the date that the Corrections Commission is expected to take action on the appeal, and the approximate date that the inmate should expect to be notified of that action. The Hearing Officer will prepare a narrative summary of the case, findings of fact, and conclusions

and recommendations and forward same to the Secretary.

The Hearing Officer's report and recommendation(s) will be presented to the Secretary for review. The Secretary may accept, reject, modify, or refer for further investigation, the recommendations of the Hearing Officer. The Secretary or his designee will notify the appellant in writing of the decision within five (5) regular working days of the decision. The decision of the Secretary is final.

18. *EFFECTIVE DATE.* The provisions of this Policy Statement apply to offenses committed after implementation of the Policy Statement, which implementation date may be determined by court order. The Corrections Department may provide explanatory language to staff and inmates to make the language of this policy statement more readily understandable so long as the explanation is consistent with the language of this policy statement.

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APPENDIX E

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW MEXICO

No. CIV-77-721P

DWIGHT DURAN, LONNIE DURAN, and SHARON TOWERS,
and all others similarly situated,
Plaintiffs,

-vs-

JERRY APODACA, Governor of the State of New Mexico,
CHARLES BECKNELL, Secretary of Criminal Justice,
EDWIN MAHR, Director of Corrections Division, LEVI
ROMERO, Warden of the Penitentiary of New Mexico,
ROBERT MONTOYA and JOSEPH LUJAN,
Defendants.

[Filed July 6, 1978]

FIRST AMENDED COMPLAINT

Plaintiffs state:

PRELIMINARY STATEMENT

1. This amended complaint is a class action brought by Plaintiffs on behalf of all prisoners who are presently, or will be, confined in the Penitentiary of New Mexico (hereinafter referred to as "PNM"). Plaintiffs contend that the totality of the overcrowding and other conditions at PNM fall beneath standards of human decency, inflict needless suffering on prisoners and create an environment which threatens prisoners' mental and physical well-

being, and results in the physical and mental deterioration and debilitation of the persons confined therein which is both unnecessary and penologically unjustifiable.

2. Plaintiffs ask this Court, after hearing the evidence on the allegations in this amended complaint, to declare that the totality of conditions and certain specific conditions presently existing at the PNM are unconstitutional under the Constitutions of the United States and New Mexico and further are in violation of certain statutes of the United States and New Mexico. Consequently, the Plaintiffs ask that the Defendants, and each of them, be permanently enjoined from operating and administering the Penitentiary of New Mexico, or any other facility to which the class members may be assigned, except in compliance with acceptable constitutional and statutory standards as are established by this Court.

JURISDICTION AND VENUE

3. The first claim for relief is filed under 42 U.S.C. sec. 1983 to redress injuries suffered by Plaintiffs and the class they represent for deprivation under color of state law of rights secured by the First, Sixth, Eighth, Ninth, and Fourteenth amendments. Accordingly, this Court has jurisdiction over the first claim pursuant to 28 U.S.C. secs. 1331, 1343(3).

4. Plaintiff's first, second, third and fourth claims for relief are derived from common nuclei of operative facts involving substantially identical issues of fact and law, such that the entire action constitutes a single case which would ordinarily be judicial economy, convenience and fairness, and in order to avoid unnecessary duplication and multiplicity of actions, this Court's jurisdiction over the second, third, and fourth claims, which are based in part upon state law, is pendent to the Court's jurisdiction over the first claim.

5. The fourth claim for relief arises under 49 U.S.C. sec. 3750(b) and the amount in controversy exceeds \$10,000.00. Therefore this Court has jurisdiction pursuant to 28 U.S.C. sec. 1331.

6. Venue is proper in this Court.

PARTIES

7. Each of the named Plaintiffs is presently a prisoner incarcerated in the Penitentiary of New Mexico. Several of them are now or have been confined in segregation facilities at PNM. Others are now or have been incarcerated in protective custody facilities. The named Plaintiffs are:

Dwight Duran, Lonnie Duran, and Sharon Towers.

8. Defendant Jerry Apodaca is the Governor of the State of New Mexico. He appoints the Secretary of Criminal Justice and consents to the appointment of the Director of the Corrections Division. He approves any action by the Secretary to apply for and receive funds. He either sits on the state's Criminal Justice coordinating council or designates a representative to do so.

9. Defendant Charles Becknell is the Secretary of Criminal Justice. It is his duty to manage all operations of the department and to administer and enforce the laws with which he or the department is charged.

10. Defendant Edwin Mahr is the Director of the Corrections Division and his numerous duties are set out N.M.S.A. 42-9-6. (effective March 31, 1978).

11. Defendant Levi Romero is the warden of the PNM and, as such, is responsible for the overall daily operation and management of the PNM.

12. Defendant Robert Montoya is Deputy Warden/Programs of the PNM and, as such, is responsible for the execution of programs in the PNM as well as other management duties.

13. Defendant Joseph Lujan is Deputy Warden/Operations of the PNM and, as such, is responsible for the operation of the PNM and general management duties.

CLASS ACTION ALLEGATIONS

14. This is a class action brought pursuant to Rule 23(a) and 23(b) (1), (2) of the Federal Rules of Civil Procedure. Plaintiffs are representative parties of the class which is composed of all persons presently confined in the PNM or who may be so confined in the future. Plaintiffs are members of the class and their claims are typical of the claims of all class members. Plaintiffs are represented by competent counsel and will fairly and adequately protect the interests of the class. The class is so numerous that joinder of all members is impracticable. The questions of law and fact presented by the Plaintiffs are common to the class. The Defendants have acted and refused to act on grounds generally applicable to the class, thereby making appropriate final injunctive and declaratory relief with respect to the class as a whole.

FACTUAL ALLEGATIONS

15. The totality of the conditions of confinement at PNM violates the constitutional and statutory rights of the Plaintiffs and has caused and is causing persons incarcerated therein irreparable harm.

16. The PNM is presently and has been for some time grossly and inhumanely overcrowded. The main buildings at PNM were built over twenty years ago. Some of the original space allocated for housing has been converted to other uses. On information and belief, the Plaintiffs allege that the present space used for housing prisoners was originally designed to house a capacity of approximately seven hundred prisoners. Although Plaintiffs maintain that the "design capacity" would not meet constitutional standards for living space for prisoners, the PNM presently houses over 1000 prisoners.

17. A portion of the prisoners at PNM live in cells, most of which are approximately 6' by 9' in size. Although cells of that size do not meet any modern recognized standards for space needed for human beings in prison, the problem is exacerbated by having two or more people housed in many of them, with one or more persons having to sleep on the floor, often without a mattress.

18. The majority of the population at PNM are housed in dormitories which are grossly and inhumanely overcrowded with bunks packed together so tightly in many places that there is no space in between them and with many prisoners being forced on occasion to sleep on the floors. The dormitories are filthy and impossible to clean under such conditions. Similarly, security is impossible to provide, thereby endangering the lives of the prisoners confined there.

19. The overcrowding in PNM in and of itself destroys any possibility of privacy for the persons housed there. It also causes tension, anxiety, frustration and emotional and psychological problems. In addition, the overcrowding exacerbates virtually every other constitutionally deficient aspect of PNM which has existed and will continue to exist in spite of the overcrowding.

20. The PNM living quarters are totally unfit for human habitation from the standpoint of health and sanitation. Mice, roaches and other vermin are commonplace. Toilets often do not work properly and are not properly cleaned. The plumbing in the institution and the sewage disposal system pose serious threats to the health of the persons incarcerated there. Inadequate lighting throughout the living areas is physically and mentally harmful to the prisoners. The lack of minimally adequate ventilation is likewise harmful to the inhabitants. Temperatures are often unbearably hot in the summer and cold in the winter.

21. The food service facilities at PNM do not meet minimal public health and sanitation standards. Proper methods are not used in preparing and handling the food served to prisoners. The food served is nutritionally inadequate.

22. Persons incarcerated at PNM are forced to live in constant fear for their lives. Physical attacks upon prisoners are commonplace. Sexual assaults also regularly occur and the refusal to submit to such assaults often results in serious physical injury. The fear of such assaults and injuries is so great that many prisoners have requested to give up what little freedom or access to programs they have in the general population to be locked up and segregated in single-cell "protective custody." This "protective custody" cell block is the most overcrowded area of the PNM with two or more prisoners confined in a cell with an area of fifty four (54) square feet. Prisoners are so confined twenty four hours a day except for two hours per week allotted for exercise or showers. Prison officials have not instituted such programs or practices as will reasonably guarantee the physical safety of prisoners from violent criminal acts against them.

23. The PNM is severely understaffed in professional, educational and security personnel. This understaffing contributes to the inability of the PNM to meet minimal constitutional standards as are described in this complaint. The staff that is available is inadequately trained.

24. The classification of persons incarcerated at PNM so that rehabilitation may take place is required by New Mexico law. Nonetheless, prisoners are not effectively classified according to their educational, vocational or health needs. Most prisoners are assigned based solely upon where space is available. Therefore, many prisoners are housed in more restrictive settings than security considerations require which is contrary to the needs of the corrections system and the prisoners and contributes to

the physical and mental deterioration of many of the prisoners. Even if the prisoners were appropriately classified, there are insufficient programs and opportunities for them at the prison. Many of the problems at PNM, including the high levels of tension, anxiety, idleness and violence, result from, or are contributed to, by the lack of a meaningful or effective classification system.

25. Idleness is the hallmark of the PNM. Most prisoners are not engaged in any regular meaningful industrial or institutional employment, training, or other constructive activity. Neither are there adequate basic, vocational or other educational programs to meet the needs of those incarcerated who desire to participate in meaningful educational training. The forced idleness contributes to a deterioration of whatever work habits and skills the prisoners may have possessed when they entered prison.

26. Recreational opportunities are inadequate. Recreational facilities, equipment, programs and staff are insufficient, thereby increasing idleness, tension and violence at the prison and contributing to the physical and mental deterioration and debilitation of those incarcerated there.

27. Visitation at the PNM is so restricted as to be either non-existent for many prisoners or meaningless to others. The lack of a reasonable visitation policy at PNM contributes to tension, anxiety and frustration, destroys ties with families and friends and contributes to mental deterioration and debilitation without any penological justification.

28. Correspondence policies at PNM are also extremely restrictive, go beyond any legitimate penological rational, and do not further any governmental interest of security, order or rehabilitation. Once again, prisoners' abilities to maintain meaningful contact with the outside world are lessened. Further, the correspondence rules are illegally, arbitrarily and irrationally drawn and are discriminatorily applied.

29. Medical and dental care and treatment is totally inadequate at PNM and constitutes deliberate indifference to prisoners' serious medical needs. Prisoners suffering from emotional and physical disabilities do not receive the special attention and treatment they require. Neither do the mentally retarded or aged and infirm receive adequate care.

30. Access to legal books and resources do not meet constitutional and other legal standards. In addition, law books and other legal materials are grossly insufficient. Attorney-client mail is often illegally inspected and read outside the presence of the prisoner.

31. Defendants MAHR and BECKNELL have refused to allow the implementation of a program designed to provide legal services for prisoners through the utilization of law students under the active supervision of licensed attorneys in violation of Plaintiffs' right of access to the Courts.

32. Fundamental tenets of due process are not followed in disciplinary proceedings at PNM. As a result of disciplinary actions by prison officials, prisoners are frequently placed in segregation cells under conditions which are barbaric and tortuous. They are subjected to shocking overcrowding and filth with no exercise, no fresh air, inadequate heat and light, and are forced to sleep on cold, hard floors under inhumane conditions.

FIRST CLAIM FOR RELIEF

33. Paragraphs 1-32 above are incorporated herein.

34. The totality of the conditions at the PNM violates the rights of persons incarcerated therein under the Eighth and Fourteenth Amendments to the United States Constitution. These conditions also violate the prisoners' rights to freedom of religion, expression and association, access to the Courts, family integrity, privacy, equal protection and due process of law guaranteed by the First,

Fourth, Fifth, Sixth, Ninth and Fourteenth Amendments to the United States Constitution.

SECOND CLAIM FOR RELIEF

35. Paragraphs 1-32 above are incorporated herein by reference.

36. The totality of conditions at the PNM which makes rehabilitation by prisoners impossible and causes the unnecessary deterioration of them violates the cruel and unusual punishment clause of the New Mexico Constitution. Article II, sec. 13. These conditions and practices as described also violate the prisoners' rights to freedom of speech, religion, equal protection, due process and other rights guaranteed by Article II, secs. 11, 17, and 18, of the New Mexico Constitution.

THIRD CLAIM FOR RELIEF

37. Paragraphs 1-32 above are incorporated herein by reference.

38. Defendants have failed to exercise their duties to operate the PNM in accord with Article II, sec. 4 of the New Mexico Constitution and N.M.S.A. 42-1-38, 42-1-1.1, 42-1-31.2, 42-9-6 (g) and 42-9-6 (h).

FOURTH CLAIM FOR RELIEF

39. Paragraphs 1-32 are incorporated herein by reference.

40. Upon information and belief, the Defendants have received funds from the United States Law Enforcement Assistance Administration (LEAA) under 49 U.S.C. sec. 3750 (b) for the planning acquisition or construction of correctional facilities. The amount of funds received by Defendants from LEAA exceeds \$10,000.

41. As a condition of the receipt of such federal funds, the Defendants contractually agreed pursuant to 42 U.S.C.

sec. 3750(b) that the programs and facilities of the correctional institutions in New Mexico, including the PNM would reflect advanced practices and standards; that advanced techniques would be used in the design of institutions and facilities; and that necessary arrangements would be provided for the development and operation of narcotic and alcohol treatment programs.

42. Plaintiffs are third party beneficiaries of the contractual arrangements between LEAA and Defendants.

43. The Defendants have failed and refused to carry out their contractual obligations under 42 U.S.C. sec. 3750(b).

PRAYER FOR RELIEF

WHEREFORE, PREMISES CONSIDERED, the Plaintiffs request that this Court do as follows:

1. Certify this action as a class action pursuant to Rule 23, F.R.C.P. with the named Plaintiffs representing a class of all persons presently incarcerated in PNM or who may be in the future.

2. Enter a declaratory judgment declaring that the totality of conditions and practices at PNM, as well as certain specific aspects thereof, violate the rights of the Plaintiffs and members of their class under state and federal constitutional and statutory standards as are specified in this complaint.

3. Enter a preliminary injunction pending the final disposition of this case, enjoining Defendants from crowding prisoners into the PNM in excess of the minimum space standards established by the United States Court of Appeals for the Tenth Circuit.

4. Enter a permanent injunction to the Defendants and each of them enjoining them from continuing to incarcerate persons in the PNM or other facilities unless and until the conditions and practices at PNM or other facili-

ties are brought into compliance with constitutional and statutory standards as specified by this Court.

5. Require the Defendants to pay the costs of this action, including a reasonable attorneys' fee for counsel for the Plaintiffs pursuant to 42 U.S.C. sec. 1988.

6. Grant such other and further relief as is proper.

7. At the appropriate time, if the Court desires, Plaintiffs' counsel will submit proposed standards and procedures to assist the Court in fashioning appropriate relief.

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3
No. 89-786

Supreme Court, U.S.

FILED

DEC 29 1989

JOSEPH F. SPANIOL, JR.
CLERK

IN THE
Supreme Court of the United States
OCTOBER TERM, 1989

GARREY CARRUTHERS, *et al.*,
Petitioners,
v.

DWIGHT DURAN, *et al.*,
Respondents.

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QUESTIONS PRESENTED

1. Should this Court address the standards for equitable modification of consent decrees in a case in which the trial court and Court of Appeals did not address equitable modification.

2. Whether, in the absence of any factual record, the Eleventh Amendment renders void a consent decree settling prisoners' civil rights, where the scope of appropriate relief necessarily turns upon the resolution of complex factual questions.



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No.89-786

SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1989

GARREY CARRUTHERS, et al.,

Petitioners,

v.

DWIGHT DURAN, et al.,

Respondents.

RESPONDENTS' BRIEF IN OPPOSITION

The respondents, a class of prisoners within the New Mexico prison system, respectfully request that this Court deny the petition for writ of certiorari seeking review of the Tenth Circuit's opinion in this case. That opinion is reported at 885 F.2d 1485 (10th Cir. 1989). The district court opinion is reported at 678 F.Supp. 839 (D.N.M. 1988).

STATEMENT OF THE CASE

The following facts, in addition to those stated in the petition, are relevant to the Court's consideration of whether a writ of certiorari should be granted.

A. Factual History

Respondents filed their amended complaint in this case on July 6, 1978. The complaint alleged that the Penitentiary of New Mexico was grossly and inhumanely overcrowded; that the dormitories were filthy and impossible to clean; that security was impossible to provide; that the living quarters were absolutely unfit for human habitation from the standpoint of health and sanitation; that persons confined in the Penitentiary were forced to live in constant fear of their lives; that physical and sexual assaults occurred regularly; that the Penitentiary was severely understaffed; that prisoners were not effectively classified;

that the prison lacked necessary programming; that the high levels of tension and violence resulted from the lack of a meaningful classification system; that the lack of meaningful visitation policies and recreational opportunities contributed to tension, violence, and mental deterioration; that medical care was deliberately indifferent to serious medical needs; that fundamental tenets of due process were not followed in disciplinary hearings; and that prisoners were frequently placed in segregation cells under barbaric and torturous conditions. Pet. App. at 199a - 203a. The complaint alleged that these facts established violations of federal law.¹ Pet. App. at 199a-203a.

While the case was pending, on February 2 and 3, 1980, the Penitentiary of New Mexico experienced a major riot. Thirty-

¹ It also alleged that the facts established violations of state law.

three prisoners were killed, and at least ninety others were seriously injured, many under unimaginably brutal circumstances.

After the riot, the state legislature required the Attorney General to investigate and report on conditions at the Penitentiary. The Governor and the Attorney General also convened a Citizens' Advisory Panel to evaluate the Attorney General's reports and oversee the rebuilding of the Penitentiary of New Mexico. The Attorney General's Report concludes that overcrowding; understaffing; inadequate classification procedures; inadequate medical, dental, and mental health care; lack of exercise and recreation; non-private visitation; and substandard food all helped to create the intolerable living conditions and extreme inmate frustration that led to the riot. Atty. Gen. Rep. on the February 2 and 3, 1980 Riot at the Penitentiary of New Mexico, 6, 8 (Sept. 1980) (Hereinafter "AG II"). The

Attorney General also condemned arbitrary enforcement of rules and the use of segregation. (AG II at 22, 27).

Following the riot, the parties entered into the consent decree now challenged by petitioners. The Attorney General's Report recognized that the consent decree "will insure that New Mexico will never again deviate so greatly from accepted standards of prison management." (AG II at 46). The Citizen's Advisory Panel agreed that compliance with the consent decree was necessary for improvements to occur. (Rep. of the Citizens' Advisory Panel to the Governor of New Mexico (Sept. 1980), cited in AG II app. at 7).

The requirements of the consent decree have continued to be necessary to assure constitutional conditions within the New Mexico Prison System. In 1986, conditions at the New Mexico prisons, including the facilities built subsequent to

the riot, led the Secretary of the New Mexico Corrections Department to write to the Governor that overcrowding portions of the system was unreasonable and that to reduce security staff while increasing inmate idleness "borders on the irresponsible. There will probably be people hurt and some may be killed during the coming year as these historically tranquil facilities react to these steps." Duran v. Anaya, 642 F.Supp. 510, 523 (D.N.M. 1986). The prison wardens agreed that there was a direct, inverse correlation in the New Mexico prison system between the incidence of acts and threats of violence and the availability of educational and recreational activities for prisoners. Id.

The provisions now challenged by petitioners involve overcrowding, classification procedures, provisions for prisoner discipline, prisoner activities, and visitation rules. The challenged provisions

are directly related to the allegations of the complaint and the conditions that led to the need for the consent decree.

B. Procedural History

On April 24, 1987, petitioners withdrew their previous motion to modify judgment, without prejudice to renewing the motion in the future. At the same time, petitioners told the trial court that it would be "more efficient and sensible" for the trial court to withhold ruling on other pending motions to modify portions of existing orders because the petitioners intended to file a new jurisdictionally-based motion. The trial court allowed the petitioners to withdraw their pending motion to modify judgment without prejudice and indicated that it was awaiting the petitioners' new motion. Duran v. Carruthers, No. 77-0721-JB (D.N.M. June 4, 1987) (Order withdrawing defendants' motion

to modify judgment).

On June 12, 1987, the petitioners filed their jurisdictionally-based motion, the motion involved in this petition. That motion sought to vacate portions of the consent decree that, petitioners alleged, went beyond the requirements of federal law and were therefore void and unenforceable under the Eleventh Amendment.

Footnote 1 to the petitioners' brief in the trial court reads in pertinent part as follows:

Unlike the pending modification motion that the Court heard last December -- and other similar modification motions that defendants may file in the future -- the present motion does not raise factual issues about present prison conditions. This motion is limited to those portions of the decree that are unenforceable as a matter of law because they purport to create entitlements that, on their face, cannot be construed as legitimate measures for vindicating federal rights. Because the Eleventh Amendment arguments raised here are quasi-jurisdictional, the Court should address these issues before deciding the pending modification motions covering many of the same portions of

the decree.

Brief for Defendants at 1-2, n. 1, Duran v. Carruthers, 678 F.Supp. 839 (D.N.M. 1988) (Emphasis added).

The trial court took petitioners at their word. The court decided only that the Eleventh Amendment did not require it to vacate the challenged portions of the consent decree on their face, without regard to current conditions in the institution or the factual interplay between these portions of the consent decree and other portions of the consent decree.

At the same time, the trial court indicated that the defendants were entitled to return to the trial court under F.R.Civ.P. 60(b)(5) for consideration of equitable modification of the decree:

Defendants' motion also seeks to vacate portions of the 1980 decree. Although the rule under which this relief is sought is not explicated, the structure of the argument makes clear defendants seek relief under Rule 60(b)(4), Fed.R.Civ.P., which provides that relief from final judgment should

be granted when "the judgment is void." See Defendants' brief, p. 13. As noted earlier, footnote 1 of defendants' brief suggests that if their comity-based arguments are rejected at the jurisdictional level, they should inform the Court's assessment of the propriety of modification. As is made clear in this order, defendants' jurisdictional arguments seeking vacation of the decree are rejected in that they are unsupported by existing law. The Court is mindful, however, that under certain circumstances, a judgment may be modified or altered in its prospective application. The potential legal bases for action of this kind need not be set out here, although the Court has addressed the issue as a general matter previously. See Order of October 3, 1986. That order evidences the Court's awareness of United States v. Swift, 286 U.S. 106, 52 S.Ct. 460, 76 L.Ed.2d 999 (1932); New York Association for Retarded Children, Inc. v. Carey, [706 F.2d 956 (2d Cir. 1983) cert. denied, 464 U.S. 915 (1983)]; Newman v. Graddick, 740 F.2d 1513 (11th Cir. 1984), and related cases.

The "flexible" approach to modification set out in Carey and related cases permits the Court to assess requests for modification that promote the interest of comity by preserving state administrative discretion as to the means of accomplishing the particular objectives set forth in a decree. That process, however, involves careful assessment not only of the structure of the order and its relationship to administrative discretion, but of other factual

considerations including, but not limited to, the state of compliance with existing orders, the degree to which any federal constitutional violations have been cured "root and branch," and the existence of safeguards to prevent future violations. That complex inquiry is one the Court will not undertake in the absence of an appropriate, comprehensive evidentiary record and a thorough briefing on the appropriate standards for modification, to include the equitable bases for modification and the particular modification sought.*

* The Court is mindful that some endeavor to this end has been undertaken previously. The defendants, however, terminated that process by filing the motion that is the subject of this order.

Pet. App. at 44a.

Instead of filing a motion for equitable modification,² the petitioners appealed the denial of their Eleventh Amendment motion to the Tenth Circuit. The Tenth Circuit affirmed the trial court, rejecting the petitioners' Eleventh Amendment

² The petitioners have still refused to file such a motion in the trial court.

argument.³

In a footnote, the Tenth Circuit made clear that its ruling did not bar petitioners from presenting a motion for equitable modification to the trial court:

The present appeal concerns only the propriety of the district court's order denying defendants' motion to vacate parts of the 1980 consent decree. We are not here concerned with defendants' right, if any, to have "equitable modification" of that decree.

Pet. App. at 15a, n. 12.

The petitioners took the position both in the trial court and the Court of Appeals [Brief for Defendants at 6, n. 14, Duran v. Carruthers, 885 F.2d 1485 (10th Cir. 1989)] that they were not seeking modifications based on changed factual circumstances. The respondents are prepared

³ The petitioners do not frame the issue upon which they seek certiorari as an Eleventh Amendment issue. Instead, petitioners claim that the issue is whether a court may refuse to vacate portions of a consent decree when subsequent legal developments make clear that those provisions go beyond the requirements of federal law.

to respond to any motion for equitable modification based on a claim of changed circumstances, as long as they are afforded the opportunity of making a full factual record of the potential impact of the proposed modifications on overall health and safety within the New Mexico prison system.

SUMMARY OF ARGUMENT

The trial court and the Court of Appeals decided only the issue of whether the Eleventh Amendment rendered the consent decree void on its face. Both courts held that the consent decree was not void under the Eleventh Amendment, and refused to consider questions of equitable modification in the absence of an appropriate factual record. Now the petitioners seek certiorari on a question that is necessarily a question of equitable modification. No question of equitable modification is properly before this Court.

Moreover, petitioners are not correct in arguing that this Court's decision in System Federation No. 91, Ry. Employees' Dep't v. Wright, 364 U.S. 642 (1961) stands for a general proposition that relief in a consent decree that goes beyond the requirements of federal law is void. In Local Number 93 v. City of Cleveland, 478 U.S. 501 (1986) this Court held that when a consent decree is within the trial court's subject matter jurisdiction, is within the general scope of the pleadings, and furthers the general objectives of the law, the consent decree is valid. 478 U.S. at 525. In addition, contrary to petitioners' argument, there has been no change in the law since the entry of the consent decree that renders this consent decree inconsistent with federal law.

Because petitioners do not challenge that the allegations of the complaint, if proven, would entitle the respondents to relief for violations of constitutional rights under Ex

Parte Young, 209 U.S. 123 (1908), the Eleventh Amendment was not violated by entry of the consent decree. By consenting to entry of the decree, the petitioners waived the right to challenge either the facts showing the existence of constitutional violations or the appropriateness of the remedy chosen by the parties. Any other rule would introduce serious theoretical and practical uncertainties into the law of consent decrees.

Because equitable modification remains open to petitioners, this case does not present any special and important reasons justifying the granting of a writ of certiorari. The decision of the Tenth Circuit, that the Eleventh Amendment did not render void the consent decree entered in this case, is consistent with the decisions of every other federal court that has considered the issue.

REASONS FOR DENYING THE WRIT

**I. NO IMPORTANT ISSUE OF FEDERAL LAW IS
PRESENTED BY THE PETITION**

- A. The Courts Below Did Not Decide the
Issue of Equitable Modification.

As noted in the Statement of the Case, the issue presented to the trial court was very different from the issue petitioners seek to present to this Court. In petitioners' brief in the trial court, they argued that the portions of the decree they challenged were void and unenforceable under the Eleventh Amendment. Brief for Defendants at 13, Duran v. Carruthers, 678 F.Supp. 839 (D.N.M. 1988).

This was the only argument that the parties briefed or that was decided in the district court. Indeed, the district court, in limiting its consideration to this issue did precisely what the petitioners had asked the trial court to do in their memorandum brief in support of their motion. See p. 9, supra.

In the petitioners' briefs in the Court of Appeals, they claimed for the first time that, not only had the issue of discretionary modification been raised in the trial court, but also that it had been decided in the trial court. As noted, this argument is not supported by a reading of the trial court's decision. See pp. 9-11, supra. Similarly, the Tenth Circuit did not decide the issue of whether equitable modification is appropriate under F.R.Civ.P. 60(b)(5). See p. 12, supra.

- B. The Issue on Which the Petitioners Seek Certiorari Is an Issue of Equitable Modification, and Is Not Properly Before This Court.

The petitioners seek certiorari on whether a federal court may refuse to vacate portions of a consent decree that go beyond the requirements of federal law "as legal developments since entry of the decree make clear." Petitioners' argument is based on System Federation No. 91, Ry. Employees Dep't

v. Wright, 365 U.S. 642 (1961) a case in which this Court modified a consent decree following a change in the underlying statute. See, Pet. at 16. Petitioners argue that changed legal circumstances require prospective modification of the decree.

In System Federation, this Court decided that in view of an amendment to the Railway Labor Act, enacted subsequent to the entry of the consent decree at issue in the case, the trial court abused its discretion by refusing to modify the consent decree. System Federation, at 651-53. The language of System Federation makes clear that the Court, in that case, was ruling on the propriety of equitable modification:

There is also no dispute but that a sound judicial discretion may call for the modification of the terms of an injunctive decree if the circumstances, whether of law or fact, obtaining at the time of its issuance have changed, or new ones have since arisen. The source of the power to modify is of course the fact that an injunction often requires continuing supervision by the issuing court and always a continuing willingness to apply its

powers and processes on behalf of the party who obtained that equitable relief.

Id. at 647. See also id. at 645, n. 4, noting that the relevant provisions of Rule 60(b) were Rule 60(b)(5) dealing with equitable modification, and Rule 60(b)(6) dealing with any other reason justifying relief from the operation of the judgment.

Consideration of the basis for modification in System Federation makes clear why the lower courts did not cite this case; System Federation is not relevant to the single issue involving the Eleventh Amendment decided in the lower courts. For the reasons stated in the previous section, issues of equitable modification were not considered by the lower courts, although they remain open to the petitioners on remand.

C. System Federation Does Not Require Modification of the Decree.

1. System Federation Involved a Consent Decree that Had Become Inconsistent with the Statute upon which the Consent Decree Was Based.

Local Number 93 v. City of Cleveland, 478 U.S. 501 (1986) discusses the applicability of System Federation to modification of consent decrees. Local Number 93 interprets System Federation as a case in which the Court found the consent decree inconsistent with the terms of the statute on which the consent decree was based. Local Number 93, 478 U.S. at 526-27. Local Number 93 reaffirms that when a change in the law renders the relief granted in the consent decree inconsistent with the statute on which the consent decree is based, the consent decree should be modified. Id. at 526. At the same time, Local Number 93 makes clear that merely because relief granted in the consent decree goes beyond the relief required by law, the consent decree is not inconsistent with the underlying statute.

Because System Federation was a case involving a provision of a consent

decree that had become inconsistent with the underlying statute as a result of an amendment to that statute, System Federation does not establish a blanket rule that all subsequent changes in the law require modification.

Similarly, Pasadena City Bd. of Educ. v. Spangler, 427 U.S. 424 (1976), also does not establish a principle that every intervening development in the law requires a court to modify a consent decree. In Spangler, this Court considered the developments in the law in light of the particular circumstances of the case:

The ambiguity of the [challenged] provision itself, and the fact that the parties to the decree interpreted it in a manner contrary to the interpretation ultimately placed upon it by the District Court, is an added factor in support of modification. The two factors taken together make a sufficiently compelling case so that such modification should have been ordered by the District Court. System Federation v. Wright, supra.

Id. at 438.

2. There Has Been No Intervening Change in the Law Justifying Modification

Even if petitioners had raised the issue of equitable modification in the lower courts, there have been no intervening changes in the law that now require modification of the decree. The two cases that petitioners specifically cite as demonstrating a change in the law are Pennhurst State School & Hosp. v. Halderman, 465 U.S. 89 (1984) and Rhodes v. Chapman, 452 U.S. 337 (1981). Pennhurst does not affect this case, however, because here all the allegations of the complaint are based on federal law.⁴ Pennhurst, of course, would have some possible application to this case only if some portion of the requested relief were based solely on state law. The fundamental rule is that a federal court may

⁴ The complaint also presented state law claims, but every allegation of the complaint had a specific basis in federal law. See Pet. App. 196a - 206a.

enforce a consent decree whose provisions mandate appropriate remedies for all constitutional violations that would have been established if the plaintiffs had proven every factual claim they had alleged in the complaint.

Rhodes v. Chapman did not change the basic principle that under certain facts prison conditions fall so far below civilized standards that they violate the Eighth Amendment. See Rhodes v. Chapman, 452 U.S. at 352 (1981), stating that "[w]hen conditions of confinement amount to cruel and unusual punishment, 'federal courts will discharge their duty to protect constitutional rights'" and citing, in an accompanying footnote, four prison cases in which overcrowding was found unconstitutional. It cannot be questioned that the conditions of confinement in New Mexico, as alleged in the complaint, amounted to cruel and unusual punishment. The trial

court was therefore justified in entering a comprehensive remedy, as chosen by the parties, to correct the constitutional violations.

D. The Courts Below Correctly Applied
 Local Number 93.

The lower courts correctly applied Local Number 93 to this case. As in Local Number 93, the challenged provisions of the consent decree are not inconsistent with the law underlying the consent decree. Neither 42 U.S.C. § 1983 nor the Eighth Amendment bars a federal court from entering a consent decree in which the state or local officials agree to a remedy for a constitutional violation that might, if the case were litigated, be different from the remedy that a federal court might enter after trial:

Accordingly, a consent decree must spring from and serve to resolve a dispute within the court's subject-matter jurisdiction. Furthermore, consistent with this requirement, the consent decree must "com[e] within the general scope of the case made by the pleadings," and must further the

objectives of the law upon which the complaint was based. However, in addition to the law which forms the basis of the claim, the parties' consent animates the legal force of a consent decree. Therefore, a federal court is not necessarily barred from entering a consent decree merely because the decree provides broader relief than the court could have awarded after a trial.

Local Number 93, 478 U.S. at 525 (citations omitted).

Petitioners argue that Local Number 93 applies only to entry of a consent decree, not to the modification of a consent decree. Pet. at 21. It is true that the Court in Local Number 93 distinguishes between the entry of a decree and certain modifications of a consent decree. That discussion in Local Number 93, however, distinguished the entry of consent decrees from attempts to modify a consent decree to provide greater relief over the objection of a defendant. Id. at 529. Local Number 93 acknowledges that under Firefighters Local Union No. 1784 v. Stotts, 478 U.S. 561 (1981), a court in

a Title VII case cannot modify an injunction over a defendant's objections in order to provide greater relief than the court could order following trial. Local Number 93, 478 U.S. at 527-28. This is a completely different issue from the issue of the enforceability of a consent decree as written.

E. The Lower Courts Correctly Decided the Eleventh Amendment Issue Presented by Petitioners.

1. The Petitioners Waived Any Challenge to the Factual Allegations in the Complaint.

The petitioners argued, in the trial court and the Court of Appeals, that Pennhurst stood for a general principle that relief that went beyond the requirements of federal law violated the Eleventh Amendment and, therefore, such relief, even if incorporated into a final consent decree, was void.

The Tenth Circuit, in a unanimous opinion, rejected this argument as

applied to this case, and affirmed the trial court. The Court of Appeals noted that Ex Parte Young, 209 U.S. 123 (1908) establishes that the Eleventh Amendment allows a federal court to grant injunctive relief against a state official who has violated federal law, and that Pennhurst does not disturb this fundamental holding of Ex Parte Young. Pet. App. at 11a.

The Court of Appeals further noted that the complaint claimed that the totality of overcrowding and other conditions at the Penitentiary of New Mexico falls beneath standards of human decency, inflicts needless suffering and creates an atmosphere that threatens prisoners' mental and physical well-being and results in the physical and mental deterioration of prisoners.

As the Court of Appeals noted, the petitioners never disputed that the allegations of the complaint, if established, entitled the respondents to relief for

violations of constitutional rights. (Pet. App. at 11a, 13a). Indeed, petitioners admit in this Court that safety is among the essential human needs protected by the Eighth Amendment. Pet. at 5. The allegations of the complaint that petitioners cannot now challenge, by virtue of signing the consent decree, tied overcrowding, the lack of classification, the lack of programming, the lack of visitation, and the arbitrary discipline to the lack of personal safety existing in the prison. Moreover, by consenting to the remedy provided by the consent decree, the petitioners waived the right to challenge the specific remedy chosen by the parties.⁵

⁵ Cf. United States v. Armour & Co., 402 U.S. 673, 681 (1971), quoted in Local Number 93, 478 U.S. at 522:

Consent decrees are entered into by parties to a case after careful negotiation has produced agreement on their precise terms. The parties waive their right to litigate the issues involved in the case and thus save themselves the time, expense, and

The Tenth Circuit cited Swift & Co. v. United States, 276 U.S. 311, 329 (1928), for the proposition that by consenting to entry of the decree, the petitioners gave the trial court power to construe the pleadings and to find in them the existence of circumstances justifying the relief provided by the consent decree.⁶ The importance of this principle comes from the complex factual inquiry necessarily involved in determining whether prison conditions fall below constitutional minima.

inevitable risk of litigation.

⁶ Here again, the defendants ignore the fact that by consenting to the entry of the decree, "without any findings of fact," they left to the Court the power to construe the pleadings, and in so doing, to find in them the existence of circumstances of danger which justified compelling the defendants to abandon all participation in these businesses, and to abstain from acquiring any interest hereafter.

Swift, 276 U.S. at 329, quoted in Duran, Pet. App. at 11a.

Depending on the particular circumstances, a variety of remedies in a particular case might be chosen by prison officials to restore personal safety and order. The parties chose these particular provisions in the context of the unique problems of the New Mexico prison system in the aftermath of one of the two bloodiest prison riots in American history. That riot demonstrated the need for fundamental change to restore the system to constitutional order. Petitioners do not challenge that the facts alleged in the complaint, if proven, demonstrated serious constitutional violations. In this context, the Eleventh Amendment does not render the remedies chosen void.

2. Eighth Amendment Issues Cannot Be Decided in a Factual Vacuum.

Because the petitioners waived any challenge to the factual allegations of the complaint, and petitioners admit that the

allegations of the complaint stated a violation of the Eighth Amendment, they cannot now challenge the factual allegations or that the allegations, if proven, would have entitled respondent to appropriate relief. Because of the nature of the Eighth Amendment, the relief required to cure such constitutional violations cannot be determined in a factual vacuum.⁷

Moreover, when necessary to remedy an unconstitutional totality of conditions, particular relief not required ab initio under the Constitution may be absolutely critical to curing the overall constitutional

⁷ See, e.g., Rhodes v. Chapman, in which this Court analyzed the lower court's findings of fact to determine whether an Eighth Amendment violation existed. Under the particular facts of the case, the Court found no Eighth Amendment violation. At the same time, the Court reaffirmed that prison conditions "alone or in combination" may violate the Eighth Amendment (452 U.S. at 347) and gave examples of cases in which lower federal courts had appropriately found Eighth Amendment violations under the particular facts of the cases. Id. at 352, n. 17.

deficiencies.⁸ In Hutto v. Finney, 437 U.S. 678 (1978), for example, this Court considered a challenge to a court order affecting the Arkansas prison system that limited punishment in isolation to a maximum of thirty days for prison disciplinary offenses. This Court held that, in the particular factual context of the case, the trial court was justified in imposing the order:

Confinement in a prison or in an isolation cell is a form of punishment subject to scrutiny under Eighth Amendment standards. Petitioners do not challenge this proposition; nor do they disagree with the District Court's original conclusion that conditions in Arkansas' prisons, including its punitive isolation cells, constituted cruel and unusual punishment. Rather, petitioners single out that portion of

⁸ This principle also applies to remedial orders not involving the Eighth Amendment. Once a constitutional violation is established, remedial decrees may require actions not independently required by the Constitution if those actions are, in the judgment of the court, necessary to correct the constitutional deficiencies. Milliken v. Bradley, 433 U.S. 267 (1977) (Milliken II); Gilmore v. City of Montgomery, 417 U.S. 556 (1974).

the District Court's most recent order that forbids the Department to sentence inmates to more than 30 days in punitive isolation.

* * *

The length of time each inmate spent in isolation was simply one consideration among many. We find no error in the court's conclusion that, taken as a whole, conditions in the isolation cells continued to violate the prohibition against cruel and unusual punishment.

* * *

The order is supported by the interdependence of the conditions producing the violation. The vandalized cells and the atmosphere of violence were attributable, in part, to overcrowding and to deep-seated enmities growing out of months of constant daily friction.... Like the Court of Appeals, we find no error in the inclusion of a 30-day limitation on sentences to punitive isolation as a part of the District Court's comprehensive remedy.

Hutto, 437 U.S. at 685, 687-88 (footnote omitted).

Ironically, in this case, one of the specific provisions that petitioners challenge is the thirty-day limitation on disciplinary isolation, the very provision

upheld in Hutto. Hutto conclusively establishes that, under appropriate factual circumstances, the order petitioners challenge may be constitutionally required.

Petitioners argue that Hutto does not support the thirty-day limitation on disciplinary isolation in this case because "the Court indicated that the time limit could be removed if the deficiencies in provisions for basic inmate needs were corrected." Pet. at 24, n. 34. The petitioners' comment underlines our point: what particular provisions are required as constitutional remedies cannot be determined in a factual vacuum. As the trial court and Court of Appeals noted, such questions should be resolved only in the context of an appropriate factual record. This is precisely what this Court required in Hutto:

Cooperation on the part of Department officials and compliance with other aspects of the decree may justify elimination of this added safeguard in the future, but it is entirely appropriate for the District Court to

postpone any such determination until the Department's progress can be evaluated.

437 U.S. at 687, n. 9.

Hutto thus strongly supports the lower court's resolve to decide possible issues of equitable modification only on a full factual record.

Each item of relief in the consent decree that petitioners challenge in their motion can be defended on similar grounds. To say that the petitioners cannot sign a consent decree that binds them to what may appear a remedy more intrusive or expensive than a court would have ordered after trial for a constitutional violation is to distort the Eleventh Amendment beyond recognition. Surely state defendants must be allowed to make a free choice that a particular remedy is appropriate, even though the remedy, viewed in the abstract, goes beyond constitutional minima.

3. The Petitioners' Argument Presents Serious Theoretical and Practical Difficulties.

There are insurmountable difficulties if the Court accepts the petitioners' post hoc piece-meal challenge to a consent decree of this kind. How will a court know what items of relief go beyond the Constitution when the proof available to the parties has long since vanished? Under what standards will a court decide that relief goes beyond constitutional requirements when the defendants challenge, out of context, a few discrete items out of a total package designed to remedy an unconstitutional totality of conditions? These problems are magnified in this case because the petitioners took the position that they had no responsibility to make any factual record showing the constitutionality of either current or past actual conditions in the prison system. The courts below were asked to make the decision about the

constitutionality of the system in a complete factual vacuum.

Just as important, the petitioners' argument, if accepted, would drastically reduce the circumstances under which plaintiffs can settle with state officials, since plaintiffs could not rely on defendants' agreement not to contest relief. Certainly requiring trials of all cases involving state defendants will impose tremendous burdens on the federal judiciary, particularly because these cases when tried on the merits are notoriously long and complicated. Nor is it easy to see why concerns for federal-state relations should lead federal courts to enforce policies that undermine the possibility for settlement in such cases. If plaintiffs cannot enter into a binding settlement with state officials, then defendants, regardless of their wishes, will have no choice but to have their constitu-

tional failings formally proven in court.⁹

F. The Case Does Not Present an Issue of General Legal Importance.

The first reason that petitioners give to justify seeking a writ of certiorari is that the issue is vitally important to the ability of states to administer institutions when the states have entered into consent decrees. Petitioners contend that under the Tenth Circuit's ruling, such institutions will continue "under close federal court supervision indefinitely and without justification in federal law." Pet. at 13 (footnote omitted).

For the reasons set forth above, no such issue is presented to this Court. Both lower courts explicitly stated that they were not deciding issues of equitable modification; consequently, petitioners are free at any time to return to the trial court to seek equitable modification.

⁹ For the reasons noted elsewhere in this response, equitable modification of course remains available.

Moreover, the lower courts followed well-established law in rejecting the petitioners' Eleventh Amendment jurisdictional challenge to the consent decree. We also believe that it was not an abuse of discretion for the trial court to decide the jurisdictional issue before it entertained motions for equitable modification and that the trial court appropriately indicated that such a motion would only be considered on a full factual record.

But even if the Court were not persuaded that respondents and the lower courts are correct on these points, the issues have no general legal importance. Any possible error in the rulings of the lower courts will become of no practical import as soon as the petitioners return to the trial court seeking equitable modification. At that time, petitioners will be able to argue that each of the modifications they seek is appropriate, and the respondents will have

an opportunity to prepare a full factual record in response to the motion. If either party should eventually seek further review in this Court, this Court's judgment will also be informed by an appropriate factual record. For these reasons, the petition does not present an important legal issue that should be settled by this Court now. See Sup.Ct.R. 17.¹⁰

Moreover, it is apparent, for the reasons given in this response, that, if adopted, the petitioners' argument about the Eleventh Amendment has numerous potentially troublesome conceptual and practical implications. No such conceptual problems attend the familiar concept of equitable modification. Because appropriate continuing supervision of consent decrees can occur through the well-developed mechanism of

¹⁰ As of January 1, 1990, the substance of this rule will be contained in Sup.Ct.R. 10.

equitable modification, there is no good reason for this Court to enter the thicket of the petitioners' argument.¹¹

II. NO CONFLICT AMONG THE CIRCUITS IS
CREATED BY THE LOWER COURT'S DECISION IN
THIS CASE

As noted above, in this case the Tenth Circuit decided that, when the allegations of a complaint are based on federal law, and the relief granted under the consent decree is related to the constitutional violations charged, the Eleventh Amendment does not require that the decree be vacated.

¹¹ Petitioners rightly do not claim that either United States v. City of Yonkers, 856 F.2d 444 (2d Cir. 1988), cert. granted sub nom., Spallone v. United States, 109 S.Ct. 1337 (1989), or Missouri v. Jenkins, 855 F.2d 1295 (8th Cir. 1988), cert. granted, 109 S.Ct. 1930 (1989) is relevant to the disposition of this case. Spallone involves questions of contempt and legislative immunity not at issue in this case, while Jenkins involves federal courts' power to impose state taxes, which is also not here at issue.

In Kozlowski v. Coughlin, 871 F.2d 241 (2d Cir. 1989), the state defendants also argued that the Eleventh Amendment required vacating a consent decree because the decree went beyond due process requirements. The Second Circuit, like the Tenth Circuit, held that because constitutional violations were alleged in the complaint, the Court had subject matter jurisdiction to enter the consent decree, so that the Eleventh Amendment did not require vacating the decree.¹² Id. at 244.

Similarly, the Fifth Circuit in Ibarra v. Texas Employment Comm'n, 823 F.2d 873 (5th

¹² Two additional circuits would necessarily come to the same result as the Tenth Circuit. The First and Third Circuits have held that entry of a consent decree can serve to waive a state's Eleventh Amendment immunity with regard to the decree. See Garrity v. Sununu, 752 F.2d 727, 730 (1st Cir. 1984) and Delaware Citizens' Council for Clean Air v. Commonwealth of Pennsylvania, 678 F.2d 470, 475 (3rd Cir.), cert. denied 459 U.S. 969 (1982). The Tenth Circuit did not reach the issue of waiver of the Eleventh Amendment defense.

Cir. 1987)), also rejected the argument that there is an Eleventh Amendment defense to a consent decree when the consent decree is based on federal law:

The concerns about state sovereignty and the lack of any federal interest that were critical to Pennhurst are not appropriate when, as in this case, the issue is one of interpreting federal law. Pennhurst "speaks not to this situation but proscribes federal courts from requiring states to conform their conduct to state law qua state law."

Id. at 877 (citations omitted).

The petitioners cite two cases as creating a conflict with the decision of the Tenth Circuit in this case. The first is Lelsz v. Kavanagh, 807 F.2d 1243, reh'g denied, 815 F.2d 1034 (5th Cir.) cert. dismissed, 483 U.S. 1057 (1987). In Lelsz, the Fifth Circuit vacated a further remedial order entered pursuant to consent decree provisions that were based solely on state law. Ibarra explicitly limits the application of Lelsz to cases in which the underlying consent

decree was based solely on state law.¹³ Accordingly, because Lelsz decided an issue involving a state law claim embodied in a consent decree, the decision does not conflict with this case. Indeed, Ibarra makes clear that the law in the Fifth Circuit on this issue is exactly the same as the law in the Tenth and Second Circuits.

Petitioners attempt to suggest that there is a conflict between this case and Lelsz by citing dicta in Lelsz that Local Number 93 does not apply to the modification of consent decrees.¹⁴ In fact, the Lelsz court dicta applied the first prong of the Local Number

¹³ In Ibarra, as in this case, the complaint alleged that the relief sought was based both on federal and state law.

¹⁴ The issue in Lelsz involved a further remedial order entered to enforce the consent decree provisions based on state law. The Lelsz court held that the consent decree did not require the further remedial order. Lelsz, 807 F.2d at 1252. Given that holding, the Lelsz court had no need to address the validity of the underlying consent decree provisions.

93 test by assessing whether or not the trial court had jurisdiction to enter the consent decree. Id. at 1252. Lelsz stands for the proposition that, in view of the fact that the underlying consent decree was explicitly based on state law, Local Number 93 does not bar an Eleventh Amendment challenge. This proposition is not inconsistent with either this case or Kozlowski.

Washington v. Penwell, 700 F.2d 570 (9th Cir. 1983), cited by petitioners to support their argument that there is a conflict among the circuits, also does not involve a conflict with this case. Washington turned on the trial court's finding that the defendants and their counsel lacked the authority under Oregon state law to sign the consent decree. Id. at 573. The consent decree on its face created funding obligations running directly against the State of Oregon. Because the Attorney General had no authority to enter the consent decree, the

Ninth Circuit vacated the consent decree under the Eleventh Amendment. Id. at 574-75. In contrast, no finding exists in this case that the consent decree was illegal under state law. Nor does any funding provision of the consent decree run directly against the State of New Mexico. Under these circumstances, nothing in Washington creates a conflict with this case.

Petitioners also cite Ruiz v. Estelle, 679 F.2d 1115 (5th Cir. 1982), and Nelson v. Collins, 659 F.2d 420 (4th Cir. 1981) as examples of the circuits' various approaches to modification.¹⁵ Once again, these cases do not conflict with this case or any of the

¹⁵ Contrary to petitioners' allegation, Ruiz did not reject the Fifth Circuit's totality of the circumstances approach in prison cases: "[It is] evident that Rhodes v. Chapman does not reject the 'totality of conditions' test that we applied in Jones v. Diamond....we read the majority opinion in Rhodes v. Chapman as adopting that test just as another panel of this court recently did in Stewart v. Winter." Ruiz, 679 F.2d at 1139 'citations omitted).

other cases previously considered in this section. Both Nelson and Ruiz, unlike this case, involved the equitable modification of decrees.

The Tenth Circuit held that the Eleventh Amendment does not require a court to vacate a consent decree grounded in federal law, regardless of factual circumstances; no other federal court has disagreed with that holding. This case, accordingly, does not afford the Court an opportunity to resolve a conflict among the Circuits. For the above reasons, review of this case should be denied.

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DEC 29 1989

JOSEPH F. SPANIOL, JR.
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IN THE
Supreme Court of the United States
OCTOBER TERM, 1989

GARREY CARRUTHERS, GOVERNOR OF NEW MEXICO,
O.L. MCCOTTER, SECRETARY OF CORRECTIONS, and
ROBERT J. TANSY, WARDEN OF THE
PENITENTIARY OF NEW MEXICO,

Petitioners,
v.

DWIGHT DURAN, LONNIE DURAN, SHARON TOWERS,
AND ALL OTHERS SIMILARLY SITUATED,
Respondents.

On Petition for a Writ of Certiorari to the
United States Court of Appeals
for the Tenth Circuit

BRIEF AMICI CURIAE FOR THE STATES OF
HAWAII, ALABAMA, ALASKA, ARIZONA, ARKANSAS,
COLORADO, DELAWARE, FLORIDA, GEORGIA, IDAHO,
INDIANA, KANSAS, LOUISIANA, MARYLAND,
MICHIGAN, MISSISSIPPI, MISSOURI, MONTANA,
NEBRASKA, NEVADA, NEW HAMPSHIRE,
NEW JERSEY, NORTH CAROLINA, NORTH DAKOTA,
OHIO, OKLAHOMA, OREGON, PENNSYLVANIA,
RHODE ISLAND, SOUTH DAKOTA, TENNESSEE,
TEXAS, UTAH, VERMONT, VIRGINIA, WASHINGTON,
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AND THE COMMONWEALTH OF PUERTO RICO
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QUESTION PRESENTED

Whether a federal court, on motion of state officials who are subject to a prison consent decree agreed to by predecessor officials, may refuse to vacate those portions of the decree that, as legal developments since entry of the decree make clear, go far beyond any federal-law requirements.



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IN THE
Supreme Court of the United States

OCTOBER TERM, 1989

No. 89-786

GARREY CARRUTHERS, GOVERNOR OF NEW MEXICO,
O.L. McCOTTER, SECRETARY OF CORRECTIONS, and
ROBERT J. TANSY, WARDEN OF THE
PENITENTIARY OF NEW MEXICO,
Petitioners,

v.

DWIGHT DURAN, LONNIE DURAN, SHARON TOWERS,
AND ALL OTHERS SIMILARLY SITUATED,
Respondents.

On Petition for a Writ of Certiorari to the
United States Court of Appeals
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BRIEF AMICI CURIAE FOR THE STATES OF
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TEXAS, UTAH, VERMONT, VIRGINIA, WASHINGTON,
WEST VIRGINIA, WISCONSIN, WYOMING,
AND THE COMMONWEALTH OF PUERTO RICO
IN SUPPORT OF PETITIONERS

INTEREST OF AMICI

The State of Hawaii, 38 other States and the Commonwealth of Puerto Rico file this brief in support of petitioners' request that this Court grant certiorari to review the decision of the Tenth Circuit in this case. That decision presents three important, related issues affecting federal court control over state government, particularly in the area of state prison administration.

The first question is whether, on the authority of *Local No. 93 v. City of Cleveland*, 478 U.S. 501 (1986), a federal court may refuse to modify consent decree provisions governing state prison administration without even making an inquiry into whether those provisions are proper remedies for violations of federal law. The second question is whether, under *System Federation No. 91, Ry. Employes' Dep't v. Wright*, 364 U.S. 642 (1961), a federal court is obliged to examine post-decree changes of law and to vacate any decree provision that is not a proper remedy under present federal law. The third question is whether, if the court undertakes the required inquiries, those inquiries must be searching ones, involving scrutiny of each challenged provision to determine if it is well-founded in a specific federal right, or whether a court's recitation that the "totality of conditions" violates the Eighth Amendment (at one prison) is sufficient to justify measures (even at other prisons) that address matters beyond federal concern.

Those issues—which affect consent decrees directly, and injunctions entered over objection to some extent as well—shape the States' ability to preserve the degree of independence from federal court supervision that is preserved to them under the Constitution—*e.g.*, under the Eleventh Amendment bar on federal court enforcement of state law against state officials, *see Pennhurst State School & Hosp. v. Halderman*, 465 U.S. 89 (1984), as well as the federalism and separation of powers principles that this Court has repeatedly stressed in rejecting undue intrusions on state prison officials' discretion, *see*,

e.g., *Turner v. Safley*, 107 S. Ct. 2254 (1987). The issues also critically affect the States' ability to operate their prisons with the measure of flexibility and discretion that is necessary for sound administration. See, e.g., *Thornburgh v. Abbott*, 109 S. Ct. 1874, 1881 (1989); *Whitley v. Albers*, 475 U.S. 312, 321 (1986). For those reasons, the issues are important to the amici States, almost all of whom either are now or have been subject to injunctions—entered either with state officials' consent or over state officials' objection—governing their prisons and other institutions.¹

STATEMENT OF THE CASE

In 1980, based on a complaint challenging the conditions at a single prison in New Mexico, predecessors of petitioners, who are New Mexico officials responsible for the operation of New Mexico's prisons, entered into a consent decree that governs the operation of all of the State's maximum and medium security prisons, including three facilities that were not opened until after the decree was entered. The decree comprehensively regulates food services, physical conditions of the facilities, sanitation, clothing, medical and mental health care, correspondence, access to attorneys and other legal resources, and staffing requirements for safety. Those provisions are not challenged. Pet. 3-5.

In 1987, petitioners moved to vacate a number of decree provisions on the ground that they are not proper remedies for any violation of federal law as it has been clarified since 1980. Those provisions, among other things, forbid double celling, no matter what the condition of the cells; require 8 hours a day of meaningful activity for most prisoners, including vocational, educa-

¹ As the petition for a writ of certiorari notes (at 14 n.18), the ACLU National Prison Project has reported that 22 States currently operate some or all of their prisons under consent decrees and that 38 operate some or all of their prisons under judicial order.

tional, and work programs; impose restrictive conditions on prison officials' use of maximum security classification and disciplinary measures; compel liberal visitation policies; and restrict petitioners' general inmate classification practices. See Pet. 5-10. Because those provisions are not proper federal law remedies, petitioners argued, they have no basis except state law,² which means that they may not be enforced because, under the Eleventh Amendment, a federal court has no jurisdiction to enforce state law obligations against state officials. See *Pennhurst State School & Hosp. v. Halderman*, 465 U.S. 89 (1984).³

The district court refused to vacate the challenged provisions (Pet. App. 16a-45a), and the court of appeals affirmed (*id.* at 1a-15a). One ground for the court of appeals' holding was that continued enforcement was proper even without serious inquiry into the specific federal law basis for each particular challenged provision. Pet. App. 14a-15a. In the court's view, this Court's decision in *Local No. 93 v. City of Cleveland*, 478 U.S. 501 (1986), authorized continued enforcement of all of the provisions simply because the decree as a whole met three conditions: (1) it "springs from and serves to resolve a dispute within the district court's subject matter jurisdiction"; (2) it "comes within the 'general scope' of the case made by [respondents] in the . . . complaint"; and (3) it "furthers the objectives upon which the complaint is based." Pet. App. 14a-15a. The court of appeals concluded that state officials could therefore properly be compelled to comply with "broader relief than the court might

² In fact, the decree provision concerning inmate activity expressly states that it is based on state law (Pet. App. 142a), and the portion of the complaint addressing classification expressly relies on state law (*id.* at 201a).

³ As petitioners explain (Pet. 11 n.13), there plainly was no waiver of Eleventh Amendment immunity by the State of New Mexico in this case, and neither the district court nor the court of appeals concluded otherwise.

possibly have been empowered to enter after trial." *Id.* at 15a.

In the alternative, the court of appeals ruled that continued enforcement of all of the challenged provisions was proper because they "[a]rguably . . . relate to, or tend to vindicate, federally protected rights." Pet. App. 11a. The primary basis for that holding was the court's conclusion that each of the provisions (at all of the prisons covered by the decree) was justified by the allegation that the "totality of the prison conditions" (at a single prison) was unconstitutional. *Id.* at 12a-13a. The court also included a footnote—containing no analysis and citing no decision that actually upheld measures like those at issue in this case—suggesting that each of the provisions by itself might be a proper federal law remedy. *Id.* at 13a n.10.⁴

INTRODUCTION AND SUMMARY OF ARGUMENT

The court of appeals' decision presents three issues that are of great importance to the maintenance of proper limits on long-term federal court control over state prison administration. First, relying on this Court's decision in *Local No. 93*, the court held that a federal court may refuse to modify consent decree provisions challenged by state prison officials without even making a particularized

⁴ The decisions cited by the court of appeals were *Pell v. Procunier*, 417 U.S. 817 (1974), which upheld visitation policies more restrictive than those compelled by the present decree; *Rhodes v. Chapman*, 452 U.S. 337 (1981), which upheld double celling in cells smaller than those at issue in the present case; *Ramos v. Lamm*, 639 F.2d 559 (10th Cir. 1980), cert. denied, 450 U.S. 1041 (1981), which rejected claims that classification and inmate activity were properly addressed in the challenged decree; and *Ruiz v. Estelle*, 679 F.2d 1115 (5th Cir.), modified, 688 F.2d 266 (1982), cert. denied, 460 U.S. 1042 (1983), which upheld double celling, reversed a space requirement like that at issue here, and rejected a "totality of conditions" analysis like the one relied on by the Tenth Circuit in this case.

inquiry into whether those provisions are proper remedies for federal law violations. Second, when the court did look at the federal law basis for the challenged decree provisions, the court ignored this Court's decision in *System Federation No. 91, Ry. Employees' Dep't v. Wright*, 364 U.S. 642 (1961), and failed to examine post-decree changes of law or to vacate those decree provisions that are not proper remedies under *present* federal law, although there were significant changes in the pertinent federal law in this case following entry of the decree in 1980.⁵ Third, the court conducted only the most superficial inquiry into whether each challenged provision is well-founded in a specific federal right, relying instead on inadequate passing citations to decisions that do not support the challenged decree provisions (*see* note 4, *supra*) and on the theory that a "totality of conditions" violation at one prison justifies measures, even at other prisons, that address matters beyond any federal concern.⁶

Those rulings all concern aspects of the general standards governing a federal court's modification of consent decree provisions that bind state officials in the administration of state institutions, such as prisons and mental-illness and -retardation institutions. Those standards

⁵ Notably, this Court's 1981 decision in *Rhodes v. Chapman*, *supra*, not only established that there is no constitutional right to single celling but, more generally, made clear that the Eighth Amendment does not address all prison conditions but only those conditions—"the minimal civilized measure of life's necessities," 452 U.S. at 348, namely, food, clothing, shelter, medical care, sanitation, and safety—the deprivation of which may constitute the unnecessary and wanton infliction of pain. Perhaps more important, this Court's 1984 decision in *Pennhurst* established that a federal court has no authority to enforce state law duties against state officials where, as here, there has been no waiver of the State's Eleventh Amendment immunity.

⁶ In light of the court's inadequate analysis, it is hardly surprising that, as petitioners demonstrate (Pet. 25-28), there is no sound federal basis for the particular provisions at issue in this case.

have produced sharp conflicts in views and practices among the courts of appeals and have been the subject of considerable recent scholarly commentary pointing out the unresolved questions in the area. This case presents an important opportunity for the Court to clarify the modification standards generally and, more particularly, to address the meaning and limits of *Local No. 93* and the vitality of *System Federation*.

This case also should be heard by the Court because the approach taken by the Tenth Circuit threatens basic constitutional values. As this Court has often made clear, the federal courts must respect fundamental constitutional limits—founded in the Eleventh Amendment, in the Tenth Amendment, in principles of federalism and separation of powers embodied throughout the constitutional structure—on their authority to intrude on States' decision making, especially in areas like prison administration. See, e.g., *Pennhurst State School & Hosp. v. Halderman*, *supra* (federal courts may enforce only federal law obligations against state officials); *Thornburgh v. Abbott*, 109 S. Ct. 1874, 1881 (1989) (federal courts must accord substantial deference to prison officials' judgments); *Turner v. Safley*, 107 S. Ct. 2254 (1987) (same, plus added deference where prisons are *state* prisons); see also *Rhodes v. Chapman*, 452 U.S. 337 (1981) (Eighth Amendment plays limited role in prescribing prison conditions). The Tenth Circuit's approach to the State's decree modification motion in this case would, if generally followed, render meaningless those limits on federal judicial authority over States. This Court should grant the petition to repudiate the Tenth Circuit's reliance on *Local No. 93* and to hold that a federal court, presented with a motion by state officials to modify a consent decree, must carefully examine the decree to conform it to the requirements of present federal law and vacate those provisions that are not proper federal law remedies.

ARGUMENT

I. This Court Should Grant Review To Clarify The Standards Governing Modification Of Consent Decrees Binding State Officials.

The issues raised in this case have produced a wide divergence of holdings and approaches among the courts of appeals. For example, like the Tenth Circuit in the present case, the Second Circuit, relying on *Local No. 93*, has held that modification of consent decree provisions binding state officials—even provisions that would not be proper post-trial remedies for violations of federal law—may be denied if the decree (1) springs from and serves to resolve a dispute within the court's jurisdiction, (2) comes within the general scope of the case made by the pleadings, and (3) furthers the objectives of the law underlying the complaint. *Kozlowski v. Coughlin*, 871 F.2d 241, 244 (1989). Refusing to vacate prison consent decree provisions that were based in state law, the Second Circuit in *Kozlowski* concluded that *Local No. 93* established sufficient conditions for entry and enforcement of a consent decree, 871 F.2d at 244; that Eleventh Amendment immunity had been waived by the entry of the decree (though the court made no inquiry into the statutory authority of the signatory officials to waive Eleventh Amendment immunity), *see ibid.*; and that the principles of deference that the Court has stressed in prison cases had no application to the question whether changed conditions warranted modification of the decree, *id.* at 248 n.8.⁷

⁷ The Third Circuit has expressed the same view as the Second Circuit on Eleventh Amendment waiver by entry into a consent decree. *See Vecchione v. Wohlgemuth*, 558 F.2d 150, 158-59, *cert. denied*, 434 U.S. 943 (1977); *Delaware Valley Citizens' Council for Clean Air v. Pennsylvania*, 678 F.2d 470, *cert. denied*, 459 U.S. 969 (1982). That position has been criticized by the Fifth and Sixth Circuits. *See Freimanis v. Sea-Land Service, Inc.*, 654 F.2d 1155, 1160 (5th Cir. 1981); *Taylor v. Perinini*, 503 F.2d 899, 901 (6th Cir. 1974), *vacated and remanded on other grounds*, 421 U.S. 982

The Fifth Circuit, in stark contrast, has rejected such reliance on *Local No. 93* in the context of a motion to modify a consent decree binding state officials. *Leslz v. Kavanagh*, 807 F.2d 1243, 1252, *reh'g denied*, 815 F.2d 1034, *cert. dismissed*, 483 U.S. 1057 (1987). The *Leslz* court concluded that both Eleventh Amendment immunity and federalism principles remained applicable in judging a State's modification motion. *Ibid.* It also adhered to this Court's *System Federation* decision, ruling that the consent decree at issue had to be reevaluated in light of the intervening decision in *Pennhurst* that federal courts may not enforce state law against state officials. 807 F.2d at 1253-54. After close examination of the present federal law basis for the challenged provision, the court held that the provision must be vacated because it required more (community placement of the mentally retarded under a "least restrictive alternative" standard) than the Constitution required (*id.* at 1249-52)—even though the district court on entering the consent decree had recognized that the decree might be based in federal as well as state law (*id.* at 1248 & n.6).⁸

Other circuits, too, have expressed views contrary to those relied on by the Tenth Circuit in this case. For example, as the *Leslz* court explained (807 F.2d at 1252

(1975). See also *Leslz v. Kavanagh*, discussed in text in the following paragraph.

⁸ In *Ruiz v. Estelle*, 679 F.2d 1115 (5th Cir.), *modified*, 688 F.2d 266 (1982), *cert. denied*, 460 U.S. 1042 (1983), the Fifth Circuit rejected the broad view, taken by the Tenth Circuit here, that a "totality of conditions" violation justifies virtually any prison-reform measure. The court explained that "a generalized and 'vague conclusion' concerning the totality of conditions is insufficient" (*id.* at 1140 n.98) and said, "[t]he 'totality of the circumstances' test does not authorize us to reform all deficient prison conditions. The remedy must be confined to the elimination of those conditions that together violate the Constitution." *Id.* at 1153. Following that approach, the Fifth Circuit reversed various portions of the district court's decree, including a ban on double celling and a space requirement of 60 square feet per prisoner. *Id.* at 1151-52.

n.11), the Ninth Circuit in *Washington v. Penwell*, 700 F.2d 570 (1983), "refused to enforce against a state a consent decree provision that exceeded the bounds of constitutional requirements." The *Penwell* court reasoned that, because of Eleventh Amendment considerations, "[t]he draconian standards applicable to requests for modification of consent decrees against private parties . . . cannot apply" to consent decrees running against States. 700 F.2d at 574 (citations omitted). Similarly, both the Fourth and Eleventh Circuits have required that consent decrees against state officials be modified to the extent that post-decree constitutional decisions have mitigated the State's burdens: they have required, in the *Leslz* court's words (807 F.2d at 1253 n.11), that the decrees be "retailored to fit the revised scope of the right." Thus, in *Nelson v. Collins*, 659 F.2d 420 (4th Cir. 1981) (en banc), the Fourth Circuit, relying on the *System Federation* rule, ordered modification of a consent decree ban on double celling, explaining that, since entry of the decree, the State had opened new prisons and this Court had made clear in *Rhodes v. Chapman*, *supra*, that there was no Eighth Amendment basis for such a ban. And in *Newman v. Graddick*, 740 F.2d 1513, 1520-21 (11th Cir. 1984), the Eleventh Circuit required the district court to consider modification of consent decree provisions, including one requiring 60 square feet per prisoner, in light of the post-decree decision in *Rhodes v. Chapman*.⁹

⁹ Finally, in contrast to the Tenth Circuit's approach in the present case, the Seventh and Third Circuits have indicated that a federal court must weigh federalism concerns in entering or enforcing consent decrees against state officials. *Kasper v. Board of Election Comm'rs*, 814 F.2d 332, 340-41 (7th Cir. 1987); *Georgevich v. Strauss*, 772 F.2d 1078, 1085 (3d Cir. 1985) (en banc), *cert. denied*, 475 U.S. 1028 (1986); *Duran v. Elrod*, 713 F.2d 292, 297 (7th Cir. 1983), *cert. denied*, 465 U.S. 1108 (1984); see Note, *Federalism and Federal Consent Decrees Against State Government Entities*, 88 Colum. L. Rev. 1796, 1801 & nn. 32, 33 (1988).

Of course, although some of the decisions discussed in this brief pre-date *Local No. 93*, that decision did not involve either modifica-

Not surprisingly—given the questions left unanswered by *Local No. 93*, and the tremendous expansion in the federal courts' control of public institutions, see note 1, *supra* (38 States operate prisons under judicial order, 22 under consent decree)—there is a considerable volume of recent scholarly commentary in this area. That commentary discusses the conflicts among the lower courts and makes clear that the issues raised by consent decrees like the one at issue in this case are profoundly important to the general problem of judicial control of the executive and legislative branches of government. See, e.g., Note, *Federalism and Federal Consent Decrees Against State Governmental Entities*, 88 Colum. L. Rev. 1796 (1988); Note, *The Modification of Consent Decrees in Institutional Reform Litigation*, 99 Harv. L. Rev. 1020 (1986); Easterbrook, *Justice and Contract in Consent Judgments*, 1987 U. Chi. Legal F. 19; Horowitz, *Decreeing Organizational Change: Judicial Supervision of Public Institutions*, 1983 Duke L.J. 1265; Jost, *From Swift to Stotts and Beyond: Modification of Injunctions in the Federal Courts*, 64 Tex. L. Rev. 1101 (1986); McConnell, *Why Hold Elections? Using Consent Decrees to Insulate Policies from Political Change*, 1987 U. Chi. Legal F. 295; Rabkin & Devins, *Averting Government by Consent Decree: Constitutional Limits on the Enforcement of Settlements with the Federal Government*, 40 Stan. L. Rev. 203 (1987). See generally 1987 U. Chi. Legal F. 1 *et seq.* (symposium on consent decrees).¹⁰

tion (as opposed to entry) of a consent decree or, more fundamentally, any of the constitutional principles that affect federal judicial control over state governments. It is those principles that are central to the recognition by various courts of appeals that there are and must be limits on the ability of federal courts to maintain perpetual control over state institutions.

¹⁰ Other voices, too, have recognized the special need for limits on the role of federal consent decrees in controlling governmental action. See, e.g., *Money Store, Inc. v. Harriscorp Finance, Inc.*, 885 F.2d 369, 374 (7th Cir. 1989) (Posner, J., concurring); Sansom

This case presents critical issues that need clarification by this Court—the meaning and limits of *Local No. 93's* discussion of consent decrees; the continuing vitality of *System Federation's* rule that a consent decree may be enforced only to the extent it implements *present* federal law; the need for careful inquiry into the federal law basis of each particular challenged decree provision in order to ensure respect for a State's Eleventh Amendment immunity and principles of federalism; and the inappropriateness of relying on a "totality of conditions" analysis to justify remedial measures that address prison conditions over and above those which ensure compliance with the Eighth Amendment. The petition should be granted to "establish uniform principles recognizing necessary limits on federal courts' authority to maintain control over state institutions through consent decrees." Pet. 30.

II. The Court Of Appeals' Approach Disregards States' Constitutionally Based Freedom From Federal Court Control Over State Institutions Except As Required By Federal Law.

Not only is clarification required on the issues raised by the court of appeals' decision. Correction of the court's approach is required as well. That approach threatens fundamental constitutional principles that preserve States' sovereign independence on matters outside the scope of federal law.

Comm. v. Lynn, 735 F.2d 1535, 1544 (3d Cir.), cert. denied, 469 U.S. 1017 (1984) (Becker, J., concurring); *Citizens for a Better Env't v. Gorsuch*, 718 F.2d 1117, 1134-37 (D.C. Cir. 1983), cert. denied, 467 U.S. 1219 (1984) (Wilkey, J., dissenting); *Memorandum of Attorney General Edwin Meese III, Department Policy Regarding Consent Decrees and Settlement Agreements*, March 13, 1986, reprinted in 3 Dep't of Justice Manual § 4-2.100A, at 4-45 (1987) ("[T]he executive's position [is] that it is constitutionally impermissible for the courts to enter consent decrees containing such provisions where the courts would not have had the power to order such relief had the matter been litigated.").

The combination of the court of appeals decision's several deficiencies—reliance on the three-part test it derived from *Local No. 93*; failure to follow *System Federation's* requirement that consent decrees be justified by present law; and refusal to make a careful examination of the specific federal basis for each particular challenged decree provision—leaves the State of New Mexico, apparently in perpetuity, subject to federal court commands that have never been plausibly justified as necessary or appropriate to vindicate any existing federal right. That result is profoundly incompatible with the structure of government established by the Constitution. In our system, a State's sovereign activities are independent of any federal control, let alone federal court control, unless federal law provides (in the present tense) a basis for restricting state authority. The court of appeals' decision abridges that independence.

One critical aspect of States' independence is jurisdictional: the Eleventh Amendment recognizes the sovereign immunity of state officials from suit in federal court in their official capacity. That immunity—where, as here, it has never been waived by the sovereign authorities of the State and has never been abrogated by Congress¹¹—defeats federal jurisdiction over state officials except, under the doctrine of *Ex Parte Young*, 209 U.S. 123 (1908), where federal law is at stake. That exception, however, is a narrow one: “*Young's* applicability has been tailored to conform as precisely as possible to those specific situations in which it is ‘necessary to permit the federal courts to vindicate federal rights and hold state officials responsible to “the supreme authority of the United States.”’” *Papasan v. Allain*, 478 U.S. 273, 277 (1986) (quoting *Pennhurst*, 465 U.S. at 105, and *Young*,

¹¹ No pertinent federal legislation abrogates the State's Eleventh Amendment immunity in this case. See *Quern v. Jordan*, 440 U.S. 332 (1979) (42 U.S.C. § 1983 does not abrogate Eleventh Amendment immunity).

209 U.S. at 160). Accordingly, "[a] federal court must examine *each* claim in a case to see if the court's jurisdiction over that claim is barred by the Eleventh Amendment.'" *County of Oneida v. Oneida Indian Nation*, 470 U.S. 226, 251 (1985) (quoting *Pennhurst*, 465 U.S. at 121) (emphasis added). Those principles are undermined by the Tenth Circuit's approach to enforcement of the consent decree in this case, because that approach approves subjecting state officials to mandatory orders of a federal court without any examination of each decree provision being enforced and, therefore, without any assurance that those particular orders are necessary to vindicate federal rights.

The court of appeals' approach also threatens elementary constitutional principles—enshrined in the Tenth Amendment and in the basic structure of the Constitution—respecting the scope of substantive authority reserved to the States. Perhaps most fundamentally, "[t]he power of the federal courts to restructure the operation of local and state governmental entities is not plenary. It may be exercised only on the basis of a constitutional violation." *Dayton Bd. of Educ. v. Brinkman*, 433 U.S. 406, 420-21 (1977) (internal quotation marks omitted).¹² In other words, a federal court may not intrude on state functions unless there is a constitutional basis for that intrusion: "A federal court, of course, must identify a

¹² This case does not involve any federal statute that imposes substantive restrictions on States' authority to administer their prisons. (Although the complaint cites 42 U.S.C. § 3750(b), the court of appeals made no reference to that provision, and it is clear from a reading of the provision—which states the aims of certain federal grants—that it guarantees no individually enforceable rights of the sort that would support the present lawsuit.) Because federal legislation is not involved, the Court's decision in *Garcia v. San Antonio Metro. Transit Auth.*, 469 U.S. 528 (1985) (Tenth Amendment limits on congressional authority enforced chiefly through reliance on state representation in Congress), is inapplicable here.

constitutional predicate for imposition of any affirmative duty on a State." *Youngberg v. Romeo*, 457 U.S. 307, 319 n.25 (1982). In the present case, the Tenth Circuit's approach approves intrusions on state prison administration without any identification of an adequate constitutional predicate.

The same principles that require a federal basis for the exercise of power over States also require caution, deference, and respect for state independence in the interpretation of federal rights against state governments and in shaping federal equitable relief. Thus, the Court has often emphasized that "a scrupulous regard for the rightful independence of state governments . . . should at all times actuate the federal courts." *Fair Assessment in Real Estate Ass'n v. McNary*, 454 U.S. 100, 111 (1981) (internal quotation marks and citations omitted). The Court has also explained that the federalism concept embodied in the Constitution defines "a system in which there is sensitivity to the legitimate interests of both State and National Governments, and in which the National Government, anxious though it may be to vindicate and protect federal rights and federal interests, always endeavors to do so in ways that will not unduly interfere with the legitimate activities of the States." *Younger v. Harris*, 401 U.S. 37, 44-45 (1971). See also *Rizzo v. Goode*, 423 U.S. 362, 378 (1976) ("[w]here, as here, the exercise of authority by state officials is attacked, federal courts must be constantly mindful of the 'special delicacy of the adjustment to be preserved between federal equitable power and State administration of its own law'") (citation omitted). Nowhere is this special regard for state independence reflected in the Tenth Circuit's approach allowing federal courts to enforce contested provisions of a consent decree against state officials—thereby reshaping state government operations and resource allocation—without serious inquiry into whether those provisions are truly justified by federal law.

The concerns for state independence—together with complementary concerns about the appropriate limits on the role of federal courts vis-a-vis the political branches of government generally—are of special importance in the area of prison administration, where day-to-day flexibility and discretion are vital to officials' ability to preserve security and to control the "ever-present potential for violent confrontation and conflagration." *Whitley v. Albers*, 475 U.S. 312, 321 (1986) (internal quotation marks omitted). See *ibid.* ("a prison's internal security is peculiarly a matter normally left to the discretion of prison administrators'") (quoting *Rhodes v. Chapman*, 452 U.S. at 349 n.14). Thus, the Court has explained:

[T]he problems of prisons in America are complex and intractable, and, more to the point, they are not readily susceptible of resolution by decree. Most require expertise, comprehensive planning, and the commitment of resources, all of which are peculiarly within the province of the legislative and executive branches of government. For all of those reasons, courts are ill equipped to deal with the increasingly urgent problems of prison administration and reform. Judicial recognition of that fact reflects no more than a healthy sense of realism. Moreover, where state penal institutions are involved, federal courts have a further reason for deference to the appropriate prison authorities.

Procunier v. Martinez, 416 U.S. 396, 404-05 (1974) (footnote omitted). The Court has further observed:

[T]he problems that arise in the day-to-day operation of a correction facility are not susceptible of easy solution. Prison administrators therefore should be accorded wide-ranging deference in the adoption and execution of policies and practices that in their judgment are needed to preserve internal order and discipline and to maintain institutional security.

Bell v. Wolfish, 441 U.S. 520, 547 (1979). See also *Thornburg v. Abbott*, 109 S. Ct. 1874, 1878, 1881 (1989)

("the judiciary is 'ill equipped' to deal with the difficult and delicate problems of prison management"; "[i]n the volatile prison environment, it is essential that prison officials be given broad discretion"); *Turner v. Safley*, 107 S. Ct. 2254, 2259 (1987).¹³ Notwithstanding those clear and repeated pronouncements, the judicial restraint mandated in prison reform cases is simply absent from the Tenth Circuit's approach to continued enforcement of the prison decree in this case. Yet that decree intrudes deeply into prison administration (*e.g.*, setting security classification, inmate discipline, and visitation standards) and substantially affects the State's allocation of resources (*e.g.*, requiring single celling and expensive inmate activity programs)—all without any careful attention to whether federal law requires such incursions on state sovereignty.

The court of appeals seems to have assumed that the consensual nature of the original decree renders inapplicable the federalism and separation of powers principles that appropriately limit federal court authority over state prison administration. That assumption is wrong. Even if those principles are not given precisely the same weight in a consent decree case as in a litigated decree case, "[t]he same factors that weigh against the granting of equitable relief in the form of an injunction should also militate against a federal court's entering or enforcing the identical measures in the form of a consent decree."

¹³ "Running a prison is an inordinately difficult undertaking that requires expertise, planning, and the commitment of resources, all of which are peculiarly within the province of the Legislative and Executive Branches of Government. Prison administration is, moreover, a task that has been committed to the responsibility of those branches, and separation of powers concerns counsel a policy of judicial restraint. Where a state penal system is involved, federal courts have, as we have indicated in *Martinez*, additional reason to accord deference to the appropriate prison authorities." 107 S. Ct. at 2259.

Note, 88 Colum. L. Rev. at 1803-04.¹⁴ Microscopic governance of state prisons is an inappropriate task for federal courts (in the absence of a federal law basis for each particular measure) even if one set of state officials welcomes the transfer of authority to the federal courts. And the sovereignty of States under our Constitution is a living sovereignty: it is the present State, with its duly elected government and delegations of authority to present officeholders, that must set current policies, must establish current budgets, and must generally determine, within the bounds set by federal law, the appropriate current operation of state institutions. There is no federal interest in aiding one set of state officials to bind the hands of their successors and their state legislatures where federal law itself exercises no substantive control over the particular matter. Hence, in a consent decree case involving a State, the Constitution's fundamental federalism and separation of powers principles reinforce and give an additional foundation to the principle that this Court recognized even in the private party setting in *System Federation*—that a consent decree, as a matter of law, must be conformed to the *present* requirements of federal law.

¹⁴ Indeed, there may be reasons why federalism and separation of powers concerns are even greater in a consent decree case than in a litigated decree case. If there has been no trial on liability, not only has there been no adjudication of a violation to support the consent decree, but there is likely to have been little inquiry into the merits of the case (and almost certainly no appellate review) at the time the decree was entered, given the understandable desire of the court as well as the parties to bring at least the opening round of the litigation to an end. Even if the court in a class action has examined the decree to ensure that it is fair for the plaintiff class, there is likely to have been inquiry into whether the decree intrudes too much into state government, because no one is likely to press that view. See Note, 88 Colum. L. Rev. at 1805-08. See also Horowitz, 1983 Duke L.J. at 1294 (discussing "*The Problem of Defendants Who Would Like to Lose*").

The Tenth Circuit's refusal to undertake a particularized inquiry into the present federal basis for each of the intrusive, contested provisions governing New Mexico's prison administration in this case upsets the proper constitutional balance and should be reversed by this Court.

CONCLUSION

The petition for a writ of certiorari should be granted.

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No. 89-786

IN THE
Supreme Court of the United States

OCTOBER TERM, 1989

GARREY CARRUTHERS, GOVERNOR OF NEW MEXICO,
O.L. MCCOTTER, SECRETARY OF CORRECTIONS, and
ROBERT J. TANSY, WARDEN OF THE
PENITENTIARY OF NEW MEXICO,

Petitioners,

v.

DWIGHT DURAN, LONNIE DURAN, SHARON TOWERS,
AND ALL OTHERS SIMILARLY SITUATED,

Respondents.

On Petition for a Writ of Certiorari to the
United States Court of Appeals
for the Tenth Circuit

REPLY BRIEF FOR PETITIONERS

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REPLY BRIEF FOR PETITIONERS

In the petition for a writ of certiorari, petitioners showed that the court of appeals misinterpreted *Local No. 93 v. City of Cleveland*, 478 U.S. 501 (1986), and upheld continued enforcement against state officials of consent decree provisions unsupported by federal law. That ruling is contrary to decisions of other circuits and incorrect on three related grounds: the Eleventh Amendment; constitutional principles of federalism, comity, and separation of powers; and cases requiring that consent decrees be conformed to present federal law. Nothing in respondents' brief in opposition reinforces the court of appeals' decision or weakens the case for this Court's review.

1. Respondents first argue that the Court may not consider "the issue of equitable modification." Br. in Opp. 16-19.¹ The court of appeals, however, in fact ruled

¹ By that, respondents evidently mean the issue whether enforcing decree provisions unsupported by federal law violates non-

on the issue, by deciding that on this record, and without further factual development, enforcement of the challenged provisions does not violate the pertinent non-constitutional legal principles that constrain district courts' discretion to enforce consent decrees. The court decided the issue in two ways. First, it ruled that *Local No. 93*, a concededly non-Eleventh Amendment, non-constitutional decision, rendered valid the district court's refusal to vacate the challenged decree provisions. Second, the court ruled, even if only cursorily (Pet. App. 12a-13a), that still-valid federal law supports the challenged provisions, thus effectively disposing of the change-of-law argument.² Indeed, with respect to the court's reliance on *Local No. 93*, respondents themselves—by defending the ruling on its merits in the portion of their brief (at 14, 24-25) preceding the Eleventh Amendment discussion (at 26-38)—implicitly acknowledge that the court of appeals actually decided the non-constitutional "issue of equitable modification."

It is precisely the court of appeals' ruling that the district court was not legally obliged to modify the decree

constitutional legal principles, such as the change-of-law doctrine of *System Federation No. 91, Ry. Employees' Dep't v. Wright*, 364 U.S. 642 (1961). Respondents' brief quite incorrectly treats the question of non-Eleventh Amendment limits on federal courts' equitable authority as entirely non-constitutional. Numerous decisions of this Court establish that constitutional principles of federalism, comity, and separation of powers do and must inform the limits of federal courts' equitable authority. See Pet. 15-16 & n.19; see also Br. Amici Curiae of State of Hawaii et al. 10 n.9. Those constitutional principles themselves (together with the Eleventh Amendment) require the vacating of consent decree provisions like those at issue here—or, at a minimum, give shape to the pertinent equitable modification principles. See Pet. 15-16, 18-20; Amicus Br. 12-18. Respondents simply ignore those considerations; their brief therefore is an utterly incomplete response to the petition.

² In these circumstances, it borders on the frivolous to suggest, as respondents seem to (Br. in Opp. 38 n.9, 39), that petitioners should file a new equitable modification motion based on change of law. The issue effectively has been decided.

on the present record that the petition challenges. That issue is squarely presented because it was squarely decided below. Contrary to respondents' suggestion (Br. in Opp. 13, 38-39), it is simply irrelevant that a *different* argument for equitable modification, based on a new factual record perhaps showing "changed circumstances," was not addressed below, for no such argument is made here.³ Of course, respondents do not and cannot cite any authority suggesting that this Court may not properly review what the court of appeals in fact decided.

Not only was the issue decided below, which is itself sufficient for this Court's review, but petitioners argued for "equitable modification," based partly on changes of law, to both of the lower courts. In the court of appeals, petitioners devoted an entire section of their brief to the argument that principles of comity required vacating the challenged provisions in light of post-decree changes of law. See Br. for Appellants 36-43 (relying on, *e.g.*, *System Federation and Pasadena Bd. of Educ. v. Spangler*, 427 U.S. 424 (1976)). In the district court, petitioners repeatedly stated in their briefs supporting the present decree-modification motion that it was based on all of the grounds that are presented in the petition—the Eleventh Amendment; constitutionally based principles of federalism, comity, and separation of powers; and the change-of-law doctrine requiring modification of consent decrees to conform to present law.⁴ Although respondents sug-

³ The court of appeals expressly noted in its final footnote that such an argument remained open and was not before it. Pet. App. 15a n.12. Respondents, while suggesting that petitioners be remitted to a factual hearing before the district court, never outline what facts they think would be relevant to the change-of-law issue.

⁴ See Mem. of Pts. & Authorities in Support of Defs. Motion to Vacate Portions of the 1980 Decree ("Br. for Defs.") at 1 (relying on the Eleventh Amendment "and principles of comity"); *id.* at 3-10 (explaining that the decree is invalid to the extent it goes beyond protection of federal rights, quoting federalism and separation of powers principles from, *e.g.*, *Bell v. Wolfish*, 441 U.S. 520 (1979); *Procunier v. Martinez*, 416 U.S. 396 (1974); *Turner v. Safley*, 107 S. Ct. 2254 (1987); *Rizzo v. Goode*, 423 U.S. 362

gest the contrary by quoting the first footnote in petitioners' district court brief (Br. in Opp. 8, quoting Br. for Defs. 1-2 n.1), that footnote merely explained at the outset of the brief that the present motion did not require any factual inquiry, and in that respect was quite unlike the previously filed but still-pending modification motion, as to which the district court had ruled that a factual inquiry was required. See Doc. No. 908, Order at 2-3 (filed Oct. 3, 1986).⁵ Even by its terms, but especially read in

(1976); *Fair Assessment in Real Estate Ass'n v. McNary*, 454 U.S. 100 (1981)); *id.* at 9-10 (arguing that "federal courts must stand ready to alter any existing decree whenever it becomes clear that any portion of that decree violates th[e] general principle" that a decree may not "go beyond what is necessary to protect constitutional rights," citing, *e.g.*, *Pasadena Bd. of Educ. v. Spangler*, 427 U.S. 424 (1976); *Nelson v. Collins*, 659 F.2d 420 (4th Cir. 1981)); *id.* at 10 (explaining that, although "established comity principles are sufficient, on their own, to require" vacating the challenged provisions, "[t]he Eleventh Amendment merely provides a concrete guarantee of these federalism principles"); *id.* at 12-13 n.8 ("even in the absence of the Eleventh Amendment, a court would be required, under the many decisions already discussed, to be receptive to any motion by state defendants seeking to bring a consent decree into conformance with current legal requirements, especially where those requirements have changed since entry of the decree," citing *Spangler* and *Nelson v. Collins*); *id.* at 21 n.16 ("comity principles requir[e] elimination of provisions that exceed federal law," citing *Nelson v. Collins* and *System Federation*); *id.* at 65 (conclusion: enforcement of the challenged provisions "is beyond the Court's power under general principles of comity and under the Eleventh Amendment"). See also Defs. Reply Mem. 12 n.13 (citing Fed. R. Civ. P. 60(b)(5), (6), explaining that *System Federation* requires change-of-law modification even in a private-party case, and stating that "when the sovereign interests of a state are implicated by a consent decree, the court has a clear duty to exercise its modification authority to reflect subsequent decisions cutting back on enforceable rights").

Ten copies of petitioners' briefs in the district court and in the court of appeals have been lodged with the Clerk of this Court.

⁵ Respondents misleadingly state that petitioners "withdrew their previous motion to modify judgment" on April 24, 1987. Br. in Opp. 7. Petitioners withdrew only one motion (filed Feb. 6, 1987), a single-page request specifically addressed to double ceiling,

the context of the rest of petitioners' argument, the quoted passage does not restrict to the Eleventh Amendment the legal grounds being asserted in support of the core argument that the challenged decree provisions "are unenforceable as a matter of law because they purport to create entitlements that, on their face, cannot be construed as legitimate measures for vindicating federal rights." Br. of Defs. 1 n.1.

2. Turning to the merits, respondents begin by attempting to distinguish *System Federation*, arguing that it does not support modification of the decree in this case. Br. in Opp. 19-21. This case, however, involves no less an inconsistency with governing law than was present in *System Federation*. There, this Court required the district court to vacate a consent decree in which a union and employer agreed not to form a union shop, explaining that the post-decree 1951 amendment to the Railway Labor Act, 45 U.S.C. § 152, permitted certain union shops. Contrary to respondents' suggestion, *System Federation* did not involve any direct inconsistency between the 1951 amendment and the decree: the amendment merely permitted but did not require a union shop. See 45 U.S.C. § 152 Eleventh ("permitted"); *Railway Employees' Dep't v. Hanson*, 351 U.S. 225, 231 (1956) ("[t]he union shop provision of the Railway Labor Act is only permissive"). To the extent there was any inconsistency, it was only that the decree impaired the general "objective[]" of the 1951 amendment to leave certain employers and unions free to form union shops if they wished. See 364 U.S. at 651; *Local No. 93*, 478 U.S. at 527. In the present case, post-1980 legal developments similarly make clear that what the decree forbids the

an issue then incorporated in the present motion. Petitioners never withdrew their much larger equitable modification motion (filed Dec. 2, 1985) covering numerous provisions of the decree. It was with respect to that motion that the district court had ruled in October 1986 that factual inquiry was required, and that is the motion addressed in the footnote quoted by respondents.

Constitution permits; and because the Constitution, for important structural and practical reasons, commits to state discretion matters not governed by federal law, a decree provision that requires state prison officials to do what federal law does not require is every bit as inconsistent with constitutional "objectives" (see, e.g., *Turner v. Safley*, 107 S. Ct. 2254, 2259 (1987)) as the *System Federation* decree provision was inconsistent with statutory objectives.⁶

Respondents next defend the court of appeals' reliance on *Local No. 93*, stating that this Court there held that "when a consent decree is within the trial court's subject matter jurisdiction, is within the general scope of the pleadings, and furthers the general objectives of the law, the consent decree is valid." Br. in Opp. 14; see *id.* at 24-26. That is not what *Local No. 93* held. Respondents' and the court of appeals' view misreads *Local No. 93*, transforming a set of necessary conditions for validity into a set of sufficient conditions, and extending the narrow statutory holding to a general principle validating consent decrees in all contexts. That view also blindly

⁶ Contrary to respondents' claim (Br. in Opp. 22-24), moreover, both *Pennhurst State School & Hosp. v. Halderman*, 465 U.S. 89 (1984), and *Rhodes v. Chapman*, 452 U.S. 337 (1981), marked significant changes in the law relied on by the decree. As for *Pennhurst*, the inclusion of state-law claims in the complaint (as well as the reliance on state law in the decree) itself attests to the pre-*Pennhurst* assumption that the federal court could enforce state-law duties against state officials. See *Lelsz v. Kavanagh*, 807 F.2d 1243, 1253 (5th Cir.), *reh'g denied*, 815 F.2d 1034, *cert. dismissed*, 483 U.S. 1057 (1987) (noting pre-*Pennhurst* assumption). Similarly, *Rhodes* has been recognized as "a ground-breaking decision." *Inmates of Occoquan v. Barry*, 844 F.2d 828, 835 (D.C. Cir.), *reh'g denied*, 850 F.2d 796 (1988). See also *Nelson v. Collins*, 659 F.2d 420, 429 (4th Cir. 1981) (directing modification of single-celling requirement in light of change of law effected by *Rhodes*). See also *Ramos v. Lamm*, 639 F.2d 559 (10th Cir. 1980), *cert. denied*, 450 U.S. 1041 (1981) (Tenth Circuit decision, subsequent to entry of consent decree in this case, reversing portions of prison decree similar to some of those at issue here).

ignores the critical differences in context between *Local No. 93* and this case: entry versus modification of a decree; consenting versus objecting defendants; non-state official defendants versus state prison official defendants. Although respondents acknowledge that the *Local No. 93* Court expressly distinguished the decree-modification question from the decree-entry question, they mistakenly claim that the Court distinguished only a case involving an effort to extend a consent decree. Br. in Opp. 25-26. In fact, the *Local No. 93* Court also carefully distinguished *System Federation*, which involved a refusal to vacate a decree. 478 U.S. at 526-27. In short, the court of appeals' refusal to vacate the decree in this case cannot be supported on the basis of *Local No. 93*.

With respect to the Eleventh Amendment issue, respondents argue that the decree provisions at issue here are proper remedies under federal law and hence can be enforced against state officials. Br. in Opp. 26-35. That argument fails to come to grips with the central flaw in the court of appeals' ruling—that the court made no serious attempt to show how each of the challenged provisions was properly tied to a federal constitutional right, given the numerous, detailed *unchallenged* decree provisions that address every aspect of prison conditions that is of federal constitutional concern. Respondents themselves make no such attempt, merely making the bald assertion that all of the decree provisions are tied to the lack of personal safety. Br. in Opp. 28; *see id.* at 26-35. That approach recognizes no limits to institutional reform by consent decree and flouts all of the principles of judicial restraint limiting the occasions for interference with state officials' operation of state prisons. *See, e.g., Turner v. Safley, supra*; Pet. 15-16.⁷

⁷ Respondents' reliance on *Hutto v. Finney*, 437 U.S. 678 (1978), betrays the same refusal to focus on the justification for each particular challenged provision, judged in light of the presence of all of the *unchallenged* decree provisions. Br. in Opp. 32-31. This Court in *Hutto* was careful to judge the 30-day limit on punitive confinement in light of the patently deficient conditions

Respondents also argue on policy grounds against requiring close scrutiny of challenged provisions of consent decrees against state officials, suggesting that such scrutiny would be difficult and that the prospect of such review would have an adverse impact on settlements and would effectively "requir[e] trials of all cases involving state defendants." Br. in Opp. 37. But such policy considerations, even if sound, could not justify overriding fundamental constitutionally based limits on federal court authority. In any event, respondents' concerns not only rest on sheer guesswork about the systemic effects of an insistence on a federal law basis for enforcement of decree provisions, but are highly dubious. It seems unlikely that plaintiffs would insist on a trial rather than enter a settlement simply because they could not enforce portions of a settlement that gave them more than they might be entitled to as a remedy after trial. Indeed, far from inhibiting settlements, a rule ensuring that state officials are not frozen into outmoded and legally unjustified consent decrees may well have the effect of encouraging settlements by state officials who otherwise would not settle. And, of course, as the practice of other courts of appeals illustrates (*see* Pet. 28-30), reviewing consent decrees to determine whether each provision has a sufficient basis in federal law would not present an impractical or unfamiliar task for courts. *See generally* McConnell, *Why Hold Elections? Using Consent Decrees to Insulate Policies from Political Change*, 1987 U. Chi. Legal F. 295.

of the isolation cells themselves. 437 U.S. at 687-88 & n.9. Respondents do not offer any explanation of how the decree provisions at issue in the present case can be justified for prison cells that were not even in existence at the time of the decree or where constitutional conditions are independently guaranteed. As the Fifth Circuit explained in *Ruiz v. Estelle*, 679 F.2d 1115, 1140 n.98, 1153, *modified*, 688 F.2d 266 (1982), *cert. denied*, 460 U.S. 1042 (1983), the "totality of the circumstances" test of *Hutto* requires a careful analysis of the need for each particular decree provision to cure any constitutional violation. The Tenth Circuit refused to undertake any such analysis.

3. Respondents finally attempt to show that the lower courts have not actually taken different approaches to the questions presented in this case. Br. in Opp. 41-47. That attempt is unavailing. Most notably, the Fifth Circuit decision in *Lelsz v. Kavanagh*, *supra*, in ruling that the consent decree at issue could not be enforced, plainly rejected the three-part test the Tenth Circuit extracted from *Local No. 93* and found sufficient in this case. 807 F.2d at 1252. Contrary to respondents' suggestion (Br. in Opp. 42-43), the Fifth Circuit's subsequent decision in *Ibarra v. Texas Employment Comm'n*, 823 F.2d 873 (1987), does not alter *Lelsz's* ruling or approach. *Ibarra* merely held that there was no Eleventh Amendment bar to enforcement of consent decree provisions that were clearly based on federal law (the defendants admitted as much, and the state statute at issue expressly incorporated federal standards). 823 F.2d at 877. *Ibarra* does not repudiate *Lelsz's* approach requiring close scrutiny of the federal law basis for each particular decree provision at issue.⁸ It is just that sort of careful analysis that the Tenth Circuit rejected here.⁹

⁸ In *Lelsz*, the Fifth Circuit did not simply state that the decree provisions at issue were based on state law. It reached that conclusion, after showing that the parties and the district court obviously thought that federal law might have supported the provisions, only upon careful analysis of whether the provisions were in fact proper remedies for violations of any federal rights. 807 F.2d at 1248 & n.6, 1247-51.

⁹ Respondents claim that *Lelsz* "applied the first prong of the *Local Number 93* test by assessing whether or not the trial court had jurisdiction to enter the consent decree." Br. in Opp. 44-45. But *Lelsz* plainly rejected reliance on *Local No. 93* for judging the validity of enforcement of a decree. 807 F.2d at 1252. See *Kozlowski v. Coughlin*, 871 F.2d 241, 244 (2d Cir. 1989) (expressly rejecting *Lelsz* conclusion). In any event, respondents' effort to conform *Lelsz* to the Tenth Circuit's reading of *Local No. 93* merely dresses up the critical issue in different garb; it does not change the issue in dispute. The question remains whether enforcement of particular consent decree provisions requires that those provisions be based on federal law, or whether, as the Tenth Circuit held, jurisdiction over the complaint as a whole justifies enforce-

Respondents' efforts to distinguish other decisions fare no better. *Ruiz v. Estelle, supra*, did not reject all use of the "totality of the circumstances" approach (Br. in Opp. 46 & n.15), but it did reject the improper catchall use of that approach to justify any prison reform measure once a totality of conditions violation has been found; the court required instead the sort of searching review of the justification for each decree provision that the Tenth Circuit has deemed unnecessary. Similarly, respondents' only basis for distinguishing *Nelson v. Collins, supra*, is that the case involved equitable modification; but so too does this case. Likewise, although respondents point out that *Washington v. Penwell*, 700 F.2d 570 (9th Cir. 1983), involved a ruling that a consent decree running directly against the state treasury could not be enforced as a contract because state officials had no authority to enter the contract, the decision also involved a ruling that the decree could not be enforced in any event because it required of state officials more than the federal Constitution requires. *Id.* at 574. Like *Penwell*, this case involves a consent decree that must be modified because it goes far beyond federal law and its enforcement therefore exceeds federal court authority over States.

CONCLUSION

The petition for a writ of certiorari should be granted.

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ment of any consent decree provision remotely related to the complaint.